Supreme Court, U.S.
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In The

Supreme Court of the United States

ARMANDO CASTILLO,

Petitioner,

v.

JAMES McFADDEN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The Trial Court Violated Castillo's Constitutional Right To Due Process And A Fair Trial By Allowing The Jury To View A Highly Prejudicial Videotape Of Castillo's Interrogation And Arrest?

II. Whether Castillo Fairly Presented His Federal Claims To The Trial Court?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Armando Castillo (hereinafter "Petitioner" or "Castillo") respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the opinion of the United States Court of Appeals for the Ninth Circuit denying Panel Rehearing and Request for Rehearing and Amending Opinion is annexed as Appendix A. The original opinion denying relief is also attached as Exhibit B. The opinion was published at 370 F.3d 882 (9th Cir. 2004). A copy of the Judgment of the District Court of the United States, District of Arizona is annexed as Appendix C.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit decided this case was June 1, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) Fifth Amendment to the United States Constitution
b) Sixth Amendment to the United States Constitution
c) Fourteenth Amendment to the United States Constitution
d) 28 U.S.C. §2253
e) 28 U.S.C. §2254
f) 28 U.S.C. §2254(b)(1)(A)
g) 28 U.S.C. §2255

STATEMENT OF THE CASE

On July 9, 1998, Castillo was indicted by the Maricopa County Grand Jury for Child Abuse, a class two felony, or in the alternative a class three felony, and a dangerous crime against children, and Murder in the Second Degree, a class one felony and dangerous crime against children. See Indictment dated July 10, 1998, 2. After a trial by jury, Castillo was convicted of the charges on May 21, 1999. See Minute Entry of the Superior Court of the State of Arizona, 10.

After Castillo's conviction, defense counsel filed a Motion for a New Trial. The state filed the Response, and Castillo filed a reply. On July 30, 1999, the parties argued the issues in the Motion for a New Trial. Both parties filed supplemental briefs on the request of the trial court. On September 1, 1999, the court denied the Motion for a New Trial. Defense counsel subsequently filed a Motion for Reconsideration which was also denied on October 20, 1999.

On December 10, 1999, Castillo was sentenced to twenty years imprisonment on the second-degree murder conviction and to seven years imprisonment on the child abuse conviction with both sentences to run consecutively. See Minute Entry of the State of Arizona, 11.

Castillo filed a Notice of Appeal to the Arizona Court of Appeals on December 10, 1999, appealing his convictions to the Arizona Court of Appeals. In a memorandum order filed December 5, 2000, the Arizona Court of Appeals affirmed his convictions and sentences. See Memorandum Decision, Court of Appeal of the State of Arizona dated December 5, 2002, 12. Castillo sought review in the Arizona Supreme Court by a petition for review filed on January 4, 2001, but that court denied review without

comment on April 26, 2001. See Notice from Supreme Court of the State of Arizona dated April 26, 2001, 13.

On March 15, 2002, Castillo filed an Amended Petition for Writ of Habeas Corpus which was denied by the District Court on April 2, 2003. On April 11, 2003, Castillo filed a Notice of Appeal from the District Court judgment and a Certificate of Appealability. On April 17, 2003, this Court issued an order regarding certificate of appealability with respect to the issue of the introduction of the videotape.

On July 15, 2003, Castillo filed an Opening Brief in the Ninth Circuit Court of Appeals on the issue of the introduction of the videotape. The Ninth Circuit Panel affirmed the District Court's dismissal of his petition on June 1, 2004. Judge Hawkins filed a dissent. The opinion was published at 370 F.3d 882 (9th Cir. 2004).

In denying the request and affirming the District Court's dismissal, the majority concluded that Castillo had failed to exhaust his state court remedies which precludes federal habeas review. In failing to reach the merits of Castillo's claim, the court reasoned that Castillo came short of making the requisite showing to the Arizona Court of Appeals necessary to preserve a constitutional claim on appeal. *Id.* at 890. The dissent argues that Castillo did in fact make the requisite showing to the Arizona Court of Appeals and that the state court understood "the nature and basis of Castillo's constitutional claims." *Id.* at 892. The dissent goes on to show that Castillo's federal constitutional claim "was certainly sufficient to alert the state of Arizona to Castillo's theory and to adequately raise the issue for exhaustion purposes." *Id.* In reaching the merits of Castillo's claim the dissent stated, "The evidence that was admitted was so prejudicial

that despite the limiting instructions, the evidence still had a substantial and injurious effect or influence in determining the jury's verdict, particularly considering there was scant other evidence presented of Castillo's alleged guilt." *Id.* at 897.

On July 28, 2004, Castillo filed a Petition for Panel Rehearing and/or Rehearing *En Banc*. The Ninth Circuit denied the petition on February 24, 2005. Judge Hawkins filed a dissent. The amended opinion, which amended the Court's earlier opinion published at 370 F.3d 882 (9th Cir. 2004), is published at 399 F.3d 993 (9th Cir. 2005).

In the amended opinion, the majority refused to address the merits of Castillo's claim and affirmed the District Court's dismissal of his petition. *Id.* The dissent again concluded that Castillo's federal constitutional claim was adequately raised to the Arizona Court of Appeals for exhaustion purposes. *Id.* at 1005.

REASONS FOR GRANTING THE WRIT

In May 1999 after a trial by jury, Castillo was convicted of second degree murder and child abuse in the State Court of Arizona, County of Maricopa. The charges stemmed from an incident where Castillo was accused of shaking a young child, Steven Young, and causing his death. Castillo was the boyfriend of the mother of the child, Clara Yates. On June 13, 1998, Castillo watched the child while the mother worked. Castillo watched the child frequently. On June 12 and June 13, 1998, the child was very sick with flu-like symptoms including coughing, phlegm-filled nasal passage, and fever and the child slept most of the day. After the mother arrived home from work in the afternoon of June 13, 1998, Castillo left the child with the mother while he picked up his own children to

return to the apartment. While Castillo was gone, the mother attempted to rouse the child from his sleeping state and found him covered in vomit and mucus. Upon seeing the child in this state, the mother testified that when she picked up the child, she panicked and "freaked out" and tried to wake him up. When she could not rouse him, she ran to a neighbor's apartment with the child, and the paramedics were called. The neighbor testified while awaiting the arrival of the paramedics, she saw vomit in the child's mouth.

Castillo presented a third-party defense that the mother's frenzied shaking of the child while she was in a panicked state (and while "freaking out") caused the injuries and subsequent death of the child from "shaken-baby syndrome". Castillo was adamant throughout interviews, the trial, and today that he never harmed the child or shook the child in any way.

During the trial, the jury was allowed to view a highly prejudicial videotape which showed Castillo's arrest, patdown, invocation of his right to counsel and numerous false and highly prejudicial misstatements of the evidence by the interrogating detective. Prior to trial, the state filed its Notice of Discovery. In the Notice, the prosecutor noted: "The state may introduce into evidence . . . evidence stemming from . . . tape-recorded interviews." The prosecutor did not indicate to the defense counsel her intention to introduce the videotape in her case-in-chief until trial had commenced. *See* Transcript (hereinafter "T".), 5/11/99, pp. 14, 4. (Castillo filed a motion prior to the filing of this brief which confirms that Castillo has several copies of the videotape available for the Court's viewing. At this time, the Court has declined to view the tapes.)

At the voluntariness hearing, the state elicited testimony from the lead investigating detective about his videotaped conversation with Castillo. Immediately after the voluntariness hearing was held, the court and parties engaged in a discussion about the evidentiary problems surrounding the videotape that the state wanted to use as evidence in trial. Defense counsel lodged objections to parts of the tapes, asking for redaction of drug references and hearsay by the detective during the interrogation. The state argued that the detective's statements were being introduced to show "investigative technique, interview technique". The state's position was that any prejudice could be cured by a jury instruction. The court stated, "Let me look at it. We'll have a hearing. I will look at it. I will listen to it. Don't mention any tapes until I hold a hearing." T., 5/11/99, pp. 14-16, 4.

The prosecutor subsequently provided the court and defense counsel with a case to support its argument that the tape should be allowed into evidence to show "investigative technique". *State v. Miller*, 186 Ariz. 314 (1996). Later, given an opportunity to argue the issue, defense counsel objected to the admission of the tape and presented to the court specific reasons for why the tape should not be admitted. T., 5/13/99, pp. 3-7, 6. The court denied the defense motion to exclude the videotape as evidence. *Id.* at pp. 7, 6.

Immediately prior to the tape being played and after Detective Lewis completing his direct testimony, defense counsel objected to the admission of the videotape based on the lack of relevancy because at no time in the detective's direct testimony did he state that Castillo confessed, made any inculpatory statements, made any inconsistent statements or contradicted any witnesses presented by the

state. T., 5/13/99, pp. 70, 7. When the state admitted the videotape in its case-in-chief, the tape still had not been completely redacted and the Judge *had not reviewed the videotape or the transcript of the videotape that the state provided to the court* even though the court had previously stated it would review the videotape. Prior to the time the videotape was shown to the jury, a transcript of the videotape was provided to the jury. See Transcribed Videotaped Interview of Petitioner dated July 1, 1998, 1. Furthermore, previous to viewing the videotape, the jury had already heard the interrogating police officer (Lewis) testify to all of the admissible facts for the state. T., 5/13/99, pp. 37-69, 7. The entire videotape was then played to the jury.

In the tape, Castillo is seen and heard proclaiming his innocence repeatedly. He is seen praying for the child. He is also seen invoking his right to counsel. Further, in the videotape, Lewis misstates critical facts in the case including facts regarding the child's medical condition and the results of the autopsy. Most notably, the detective states "[The] brain injury could of only happened while he was with you" and "You're the one that did it, okay."

Also, in the videotape, the detective repeatedly tells Castillo that he is the person who caused the child's death and that he is a liar (i.e., "No, I just don't believe you. You're lying to me." and "You're the only one that's taken care of him, so it has to be you that caused that injury and your (sic) lying about it!"). However, when Detective Lewis was cross-examined by defense counsel after the videotape was shown to the jury, the following questions and responses occurred regarding the detective's interview of the mother, Clara Yates:

> Question: Okay. Do you remember in your second interview with her, you made the statement that, "I don't know if Armando did it

or if it was you that did it cuz (sic) I don't know you." Do you remember making that statement?

Answer: I did.

Question: Do you remember also in your second interview, sir, making the statement, "Hey, you know, that as Steve's mother, that you could be held responsible for what is going on right now, okay. . . . And I also need to know if you know of any situations where he'd actually abused Steven." She said, "No." Do you recall those statements, sir?

Answer: Yes.

T., 5/13/99, pp. 68-9, 7.

Further in the tape, the detective also states that Castillo is lying about the child eating a cheeseburger because there was no food found in the child's stomach at the autopsy. Yet, the Medical Examiner, Dr. March Fischione, testified at trial that if a child ate before receiving this type of injury, it would not be "unusual that [the medical examiner] did not find anything in the stomach" because the child's "stomach emptying would still continue to go on" even though the child was on life support. T., 5/18/99, pp. 76, 9. These are just a few examples of the material misstatements that Detective Lewis made on the tape that the jury heard. *See* Transcript of Videotape Played to the Jury and the Videotape.

After the jury and the court viewed the videotape, the court stated:

> In my 19 years on the trial bench, I have never ever admitted a tape like that in evidence. I'm really concerned about it. I actually thought at first that counsel had agreed ahead of time, had exchanged transcripts, had viewed all of the tapes, the video, the

> audio, that there wasn't really a big objection to the admission of these tapes.
>
> I was surprised when Mr. Rosenquist stood up before we played any of these and he said he made an objection that it's irrelevant, there are no admissions, it shouldn't have been admitted. I really thought it was a *pro forma* objection. I was – I assumed Mr. Rosenquist wanted these tapes to be heard, to be played for the jury.
>
> I was not asked ahead of time to view these tapes but the trial judge has a duty to do that if there's an objection made, a specific enough objection to alert me that there is a real problem, that one side really does not want the tapes in or the transcripts revealed. . . .
>
> I was, therefore, shocked when I started to hear this tape and read some of the things on this, the transcripts. The man invoking his rights was shown to the jury, his arrest, his pat down. I mean I never would have admitted any of this.

T., 5/13/99, pp. 70-71, 8.

Because this improper and highly prejudicial evidence was admitted, the balance of the evidence was upset and Castillo was denied due process and a fair trial in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

I. The Trial Court Violated Castillo's Constitutional Right To Due Process And A Fair Trial By Allowing The Jury To View A Highly Prejudicial Videotape of Castillo's Interrogation And Arrest.

a. Standard of Review

The District Court's denial of a 28 U.S.C. §2255 petition is reviewed *de novo*. *Brecht v. Abrahamson*, 507 U.S. 619, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993).

b. The admission of the highly prejudicial and unnecessary videotape was clearly a violation of Castillo's right to due process and a fair trial guaranteed by the United States Constitution.

The trial court failed to review the evidence prior to showing the tapes to a jury even though defense counsel alerted the court to the prejudicial information on the tapes. The court had stated that it would review the videotape and ordered the state and defense counsel to not discuss the videotape until the court reviewed the tape and held a hearing as to the videotape's admissibility. T., 5/11/99, pp. 15-16, 4. The court never reviewed the videotape or the transcript of the videotape before it was shown to the jury. As a result, a tape containing *extremely* prejudicial information was admitted. Further, *prior* to the showing of the tape to the jury, Detective Steve Lewis, the chief investigating police detective, completed his direct examination before the jury. At no time in the detective's direct testimony did he state that Castillo confessed, made any inculpatory statements, made any inconsistent statements or contradicted any witnesses presented by the state which laid the foundation for defense counsel's objection to any portions of the videotape being played because it was simply irrelevant. T., 5/13/99, pp. 70, 6. After the videotape was played, defense counsel's previous arguments relating to specific objectionable material was validated. There was no reason to submit the prejudicial videotape to the jury except to inflame the jury and create an emotional reaction contrary to the evidence. Clearly the introduction of the videotape infected Castillo's trial with unfairness which made his conviction a denial of due process.

Moreover, contrary to the Arizona Court of Appeals' decision, the introduction of the videotape *was not* harmless error because there was no "overwhelming evidence" that Castillo harmed the child. The proper standard of harmless-error review was set forth in *Kotteakos v. U.S.*, 328 U.S. 750, 776, 90 L.Ed. 1557 (1946). The standard is whether the violation "had substantial and injurious effect or influence in determining the jury's verdict." The introduction of the videotape most definitely had a substantial and injurious effect and influence on the jury and the determination of the jury's verdict. The videotape of Castillo being accused of murder and repeatedly confronted with false evidence by a police detective with a contemptuous, dismissive attitude was highly prejudicial and should not have been shown to the jury. The videotape was not relevant, and any relevant evidence in the videotape was obtained through the prior testimony of Detective Lewis. Because this improper and highly prejudicial evidence was admitted, the balance of evidence was upset and Castillo was denied due process and a fair trial in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

This videotape has no relevance since there was nothing resembling a confession in the videotape. Castillo maintained his innocence throughout the course of the videotape. He also indicated that he wanted a lawyer, and eventually ended the interview by exercising his right to counsel. *See Id.* at 6 and *Id.* If there was any relevant information in the videotape, it was obtained through the prior testimony of Detective Lewis who was the interrogator in the videotape. Clearly, the trial court's admission of the videotape was arbitrary and fundamentally unfair to Castillo, and the absence of fundamental fairness fatally

infected Castillo's trial which entitles him to a reversal of his convictions.

c. There was no overwhelming evidence presented concerning the child's death; thus the videotape had a substantial, injurious effect on jurors, and was not harmless error.

Under *Brecht v. Abrahamson*, 507 U.S. 619, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993), the habeas petitioner must demonstrate that the constitutional error was prejudicial and not merely harmless error. 507 U.S. at 637-38 (habeas relief reserved for those "grievously wronged") (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967)). Given the upset in the critical balance in this case due to the admission of the videotape absent anything more than questionable circumstantial evidence, Castillo was "actually prejudiced" by the videotape.

The government has attempted to mislead the lower Courts into upholding the Arizona Court of Appeals' decision and into believing that the state presented overwhelming evidence of Castillo's guilt on the charge of murder. The following "facts," which have been pointed out by the government in past briefs, are irrelevant to the murder charge and do not demonstrate overwhelming evidence.

Bruises on the child's stomach and testicles.

The government has previously cited bruises on the child's stomach and testicles as overwhelming evidence in this case. At trial, the mother, doctors, and the medical examiner testified concerning bruises on the child's scrotum and belly. The mother testified she first noticed the bruises on the scrotum and belly ***six days prior*** to the

child's death on Monday, June 8, 1998. Trial Transcript of Proceedings of *Arizona v. Castillo* (CR98-09620), May 11, 1999, 128-29. (Emphasis added.) Dr. Mark Fischione corroborated the mother's testimony concerning the bruises by testifying that the bruises appeared to be approximately five to eight days old at the time of death. *Id.*, May 18, 1999 at 20. It is irrefutable that the bruises are in no way related to the cause of the child's death.

This evidence might have been relevant to the charge of child abuse, but nothing even indicates that Castillo caused the bruises since the child visited his father a week prior to the child's death and had interacted with others during this time frame. It is critical that these bruises are not used to undermine the critical balance of who shook the child. The bruises are wholly unrelated to the cause of death and the charge of second-degree murder.

The conversation between Castillo and the Mother in the parking lot shortly before the child's death.

Second, as part of the "overwhelming" evidence against Castillo, the government has previously pointed out a conversation between Castillo and the mother that took place shortly before the death of the child. This conversation occurred in the parking lot of the mother's apartment after she returned from getting food for the child and Castillo. During the conversation Castillo allegedly called the mother a "fucking slut" and "bitch" for forgetting his cigarettes. Again, this evidence is unrelated to the child's cause of death or the abuse charge; yet, the evidence is highly inflammatory and prejudicial.

Moreover, the evidence concerning the mysterious bruises and Castillo's outburst toward the mother in

public are simply attempts by the government to classify Castillo as a bad person. The government would have this Court uphold the conviction because in the government's opinion there is "overwhelming evidence" that Castillo is a "bad man." Castillo implores this Court to consider this videotape as an unacceptable manipulation of the jury and to acknowledge there is no overwhelming evidence in this case.

The Mother's testimony concerning the events on the day of the child's death.

The government has also previously cited to testimony of the mother of the child. It is important to note that she was the only other person besides Castillo that was alone with the child during the time the lethal shaking occurred. Therefore, a very reasonable conclusion is that the mother most likely caused the death by shaking the child in her panicked state. The mother testified to her very violent reaction to discovering the sleeping child. Trial Transcript of Proceedings of *Arizona v. Castillo* (CR98-09620), May 12, 1999, 60, 79, 163-164; 5. Mother's testimony included admissions such as she "panicked" and "freaked" when she could not rouse the sick child. The child was very ill during the few days prior to the child's death, and Mother testified that she viewed mucus and vomit in the Child's mouth when she removed the blanket. She **"thought he choked on throw up ... [and she] got scared.... [She] picked him up and he felt funny.... [and she] could not wake him up.... [Then the child] felt like Jello."** *Id.* The neighbor who testified at trial confirmed that the child had vomit in his mouth from his illness. The neighbor testified that while awaiting the arrival of the paramedics, she saw vomit in the child's mouth.

The jury, due to the emotional and inflammatory nature of the videotape, disregarded mother's testimony indicating that she likely caused the injury that led to the child's death. Despite the reasonable conclusion that the Mother caused the death, a portion of the videotape showed to the jury contains an excerpt of the interrogating detective proclaiming, "It wasn't Clair (the mother) that did it! Okay, it was you." *See* Transcribed Videotaped Interview of Petitioner, 1, p. 7.

Further in the tape, the detective states that Castillo is lying about the child eating a cheeseburger because no food was found in the child's stomach at the autopsy. Yet, the Medical Examiner, Dr. March Fischione, testified at trial that if a child ate before receiving this type of injury, it would not be "unusual that [the medical examiner] did not find anything in the stomach" because the child's "stomach emptying would still continue to go on" even though the child was on life support. T., 5/18/99, pp. 76, 9. These are just a few examples of the material misstatements that Detective Lewis made on the tape that the jury heard. Such declarations by a police officer interrogating Castillo while he was in custody seriously undermined Castillo's defense that the mother shook the child.

When the detective was cross-examined by defense counsel, the following questions and responses occurred regarding the detective's interview of the mother, Clara Yates:

> Question: Okay. Do you remember in your second interview with her, you made the statement that, **"I don't know if Armando did it or if it was you that did it cuz (sic) I don't know you."** Do you remember making that statement?

Answer: I did.

T., 5/13/99, pp. 68-9, 7. (Emphasis added.)

Additionally, these statements by the interrogating officer on the videotape caused the jury to ignore mother's own statements which support Castillo's defense. The mother testified that Castillo was good with the child. During direct examination by the prosecutor, she testified:

> Q: Now, tell us how Armando treated Steven when you were around when you were in the apartment?
>
> A: He was good to him.

Trial Transcript of Proceedings of *Arizona v. Castillo* (CR98-09620), May 11, 1999, 133. During cross examination, the mother testified that one of the main reasons that she was attracted to Castillo was that he treated her child so well.

> Q: One of the big reasons why you really liked Armando was the way he treated your child so well and the way he was so good around his children and your child . . . isn't that correct?
>
> A: Yes

Id., May 12, 1999 at 45. Also, the mother testified that the day after the child was fatally injured she told Detective Lewis ten or fifteen times that Castillo "[would] never shake a child, would never hit a child, [and that she] never saw him hit a child, [and that] he would never hurt a child." *Id.*

The contents of the videotape contain the elements contrary to a defendant's right to a fair trial cited in *Harrell v. Israel,* 672 F.2d 632, 635 (7th Cir. 1982) and *U.S. v. Hale,* 422 U.S. 171 (1975). The tape showed Castillo in custody, being interrogated, accused, presented with false evidence, and being told that "its ***scientifically proven*** by the doctors and everybody else" that you

murdered the child. (Emphasis added.) Clearly, this videotape was introduced for the sole purpose of allowing the jury to see Castillo treated as if already found guilty.

d. This case involved one issue: Whether Castillo or the mother caused the injury that killed the child. The right to a fair trial was violated because the playing of the videotape destroyed the critical balance in this case.

This was an extremely emotional case involving the injury and death of a very young child. The jury could have easily been swayed by improper and prejudicial evidence showing Castillo treated as if he had already been found guilty. Further, there was independent testimony that Castillo's girlfriend, the mother of the child, could have caused the injury that led to the child's death which the jury may have disregarded due to the emotional and inflammatory nature of the videotape.

The trial court in Castillo's case acknowledged its error and expressed great shock in admitting the videotape. T., 5/13/99, pp. 70-71. (The Court of Appeals also acknowledged the error in its memorandum opinion.) The trial court stated that had a review been done, the court would never have allowed the jury to view the tape. The court's concerns are well founded. The United States Supreme Court has held *"When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." See Shepard v. U.S.*, 290 U.S. 96, 104 (1933) (Emphasis added.) (concluding that the government's silence during the police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact); *see also*,

Grunewald v. U.S., 353 U.S. 391 (1957). Furthermore, evidence having a dual tendency, inadmissible and gravely prejudicial for one purpose but not objectionable for another if separately considered, should be excluded from the jury where the feat of ignoring it in the one respect while considering it in the other **is too subtle for the ordinary mind and the risk of confusion is so great as to upset the balance of practical advantage**. *Id.* at 103. (Emphasis added.)

Furthermore, the court had ***ample*** opportunity to review the contents of the videotape prior to the video being shown to the jury. Even as a last resort, the court could have reviewed the transcript of the videotape provided to it by the state prior to allowing the videotape to be shown to the jury. Also, the court was put on notice when defense counsel made his final objection that the videotape was irrelevant after Detective Lewis had testified and just prior to the videotape being shown. The courts have consistently recognized the important role the trial judge plays in the criminal justice system:

> "[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. . . . A criminal trial does not unfold like a play with actors following a script. . . . The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. . . . **If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.**"

Geders v. U.S., 425 U.S. 80, 86-87 (1976). (Emphasis added.)

Denial of due process in a criminal trial "is the failure to observe that fundamental fairness essential to the very concept of justice. *Lisenba v. California,* 314 U.S. 219, 236 (1941) (a coerced confession admitted in evidence is contrary to due process). Habeas corpus relief for an asserted violation of due process is available only when the state court's action is arbitrary or fundamentally unfair. *U.S. ex rel. Burnett v. Illinois,* 619 F.2d 668, 670 (7th Cir.), *cert. denied,* 449 U.S. 880 (1980).

In addition to the judge's failure to properly review the videotape, the state in an effort to mislead the court and have the duplicitous tape shown to the jury offered a Supreme Court of Arizona case, *State v. Miller,* 186 Ariz. 314, 322, 921 P.2d 1151, 1159 (1996) to the Court. In *Miller,* a detective's statement admitted over defendant's hearsay objection was part of defendant's interrogation admitted to show its effect on defendant during his interrogation and was not offered for its substantive content. This case was *clearly not relevant nor on point*; yet, the state still presented the case to the court in its effort to have the improper videotape shown to the jury. In the *Miller* case, the statements were not videotaped, the statements were part of defendant's confession, the case contained overwhelming evidence against defendant including his confession, and the case was a capital case. In the *Miller* case, it was clear that the statements were offered to show the authenticity of a confession and that the confession was knowingly, intelligently and voluntarily made to the police. Further, it was used to demonstrate that the confession was not made under duress and the police used proper procedure in obtaining the confession. In Castillo's case, Castillo *did not confess, make any inculpatory statements, make any inconsistent statements or contradict any witnesses presented by the state.* Moreover, prior to the

showing of the videotape, the detective testified to all the relevant state's evidence on direct examination.

In this case, the state's improper arguments involving the *Miller* case infected the trial court's decision on a critical issue and led to a conviction based on the denial of due process. Further, the conduct of the prosecutor in misleading the court coupled with the court not viewing the videotape upset the critical balance in this case. The critical balance in this case was the decision the jury had to make as to whether Castillo purposefully shook the child or the mother in her panicked state accidentally shook the child which caused the injury leading to the child's death.

A claim for deprivation of due process will succeed if the trial court's errors rendered the trial arbitrary or unfair. As in the case at hand, the videotape had no relevance to the case against Castillo, and the error was of constitutional dimension. *See Territory of Guam v. Shymanovitz*, 157 F.3d 1154, 1159-61 (9th Cir. 1998) (court reserved in a case where no limiting instruction could have possibly cured the prejudicial effect of the admittance of evidence regarding contents of pornographic magazines in defendant's possession in case where charge was unlawful sexual activity with minors; the underlying premise of our criminal system is that the defendant must be tried for what he did, not who he is); *U.S. v. Brooke*, 4 F.3d 1480, 1487 (9th Cir. 1993) (court reversed case in which the state introduced prejudicial evidence of appellant falsely telling individuals that she had cancer).

Further, the admission of this videotape is analogous to a defendant appearing before a jury in shackles:

> This right [not to appear before a jury in shackles] springs from the basic principle of American jurisprudence that **a person accused of a crime is presumed innocent until his guilt has been established beyond a reasonable doubt. For this presumption to be effective, courts must guard against practices which unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion.** As one court has observed, if a defendant is to be presumed innocent, he must be allowed the indicia of innocence.

Harrell v. Israel, 672 F. 2d 632, 635 (7th Cir. 1982). (Emphasis added.) Obviously, the danger inherent in such a procedure is that **a jury will presume the defendant's guilt based on appearance alone**. (Emphasis added.) Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak after Maryland v. Craig*, 27 St. Mary's L.J. 389, 410-1 (1996).

In *U.S. v. Hale*, 422 U.S. 171 (1975), the United States Supreme Court reversed a case like Castillo's in which improper and prejudicial evidence was introduced:

> First, the record reveals respondent's repeated assertions of innocence during the proceedings; there is nothing in the record of respondent's testimony inconsistent with his claim of innocence. . . . The Government nonetheless contends that respondent's silence at the time of his arrest is probative of the falsity of his explanation later proffered at trial because the incentive of immediate release and the opportunity of independent corroboration would have prompted an innocent suspect to explain away incriminating circumstances. . . . Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice.

Id. at 179-181.

The trial court's admission of the videotape was arbitrary and fundamentally unfair to Castillo and the absence of fundamental fairness fatally infected Castillo's trial entitling him to a reversal of his convictions.

II. Castillo Fairly Presented His Federal Claims To The Trial Court.

Federal habeas review should not be barred because Castillo properly exhausted his state court remedies. The state court has been fairly presented with Castillo's federal constitutional claims at both the trial and the state appellate proceedings.

A state prisoner must exhaust his state remedies before petitioning for a writ of habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887 (1995). To exhaust state remedies, a prisoner must fairly present federal constitutional claims to the state courts in a procedurally appropriate manner. *Castille v. Peoples*, 489 U.S. 346, 351-52, 109 S.Ct. 1056 (1989). A "fairly presented" claim describes the operative facts and federal legal theories of the claim. *Duncan*, 513 U.S. at 365-66. State prisoners have exhausted their claims for the purpose of federal habeas review when they are "fairly presented" in a procedurally appropriate manner to the Court of Appeals. *Swoopes v. Sublett*, 196 F.3d 1008, 1009-10 (9th Cir. 1999).

On May 27, 1999, Castillo filed a Motion for New Trial and on July 12, 1999, Castillo filed his Memorandum of Points and Authorities in Support of Motion for New Trial ("Memorandum"). Castillo's Memorandum clearly states in the first paragraph that "[f]undamental error regarding the admission of irrelevant and prejudicial evidence violated Defendant's rights to due process and a fair trial."

Castillo then cited the Fifth and Fourteenth Amendments to the U.S. Constitution. In addition, Castillo's Memorandum relied upon and cited numerous U.S. Supreme Court cases in support of his position.

Further, on August 26, 1999, Castillo filed a Supplemental Briefing Pursuant to Court's Request ("Supplemental Briefing") which requested a new trial based upon the fact that Castillo was "denied due process of law under the United States Constitution" when the trial court "failed to hold a proper evidentiary hearing in response to defense counsel's objections to the admission of a taped interview of the Defendant." Castillo then again cited the Fifth and Fourteenth Amendments to the U.S. Constitution and numerous U.S. Supreme Court cases regarding the denial of due process.

Following the denial of his Motion for New Trial, Castillo then filed a Motion to Reconsider Motion for New Trial again arguing that Castillo was denied due process of law under the U.S. Constitution when the Court held that the admission of the tapes was harmless error. Moreover, Castillo's Opening Brief in the Arizona Court of Appeals and Petition for Review in the Arizona Supreme Court both reiterated the arguments set forth in the Motion for New Trial, Memorandum, Supplemental Briefing and Motion to Reconsider. Therefore, Castillo fairly presented his denial of due process and denial of fair trial claims to the State Courts and clearly raised a federal constitutional claim. Habeas relief is not barred and is appropriate in this case.

a. The Ninth Circuit Court of Appeals' decision overlooked the material facts and U.S. Supreme Court and Ninth Circuit case law regarding Castillo's fair presentation of his Fourteenth Amendment claim because Castillo described the operative facts and federal legal theory within his Arizona Court of Appeals brief.

The panel that authored the majority opinion did not address the merits of Castillo's claim because it held that Castillo did not properly exhaust state remedies, and the claim was therefore procedurally defaulted. However, as stated by the dissent, Castillo alerted the Arizona Court of Appeals that he was raising a fair trial claim under the Fourteenth Amendment due to the prejudicial videotape because he described the factual nature of his claim in conjunction with references to fair trial and the Fourteenth Amendment within the four corners of his Arizona Court of Appeals brief.

To properly exhaust state remedies, a prisoner must "fairly present" federal constitutional claims to the state courts in a procedurally appropriate manner. *Castille*, 489 U.S. at 351-52. A "fairly presented" claim describes "both the operative facts and federal legal theory" of the claim so that the Arizona Court of Appeals had a fair opportunity to apply controlling legal principles to the facts bearing upon a constitutional claim. *Duncan*, 513 U.S. at 365-66. To "fairly present" a claim, a petitioner "must include reference to a specific constitutional guarantee, as well as a statement of facts which entitle the petition to relief." *Gray*, 518 U.S. 152, 162-63. Castillo met the following tests for proper exhaustion of state remedies; however, the Ninth Circuit Court of Appeals ignored the above standards and

incorrectly limited legitimate vindication of individual constitutional rights.

Castillo made more than a general appeal, here, and more than just a state law claim. Castillo's federal constitutional claim adequately alerted the Arizona Court of Appeals to Castillo's federal legal theory and adequately raised the issue for exhaustion purposes. It is undisputed that Castillo did describe the facts surrounding the admission of the videotape in his brief to the state appellate court. In Castillo's state appellate court briefs, he also argued that he was denied a fair trial in violation of the Fourteenth Amendment. Also Castillo cited federal cases, which alerted the Arizona Court of Appeals that Castillo was seeking relief under federal law. Finally, in his conclusion, Castillo argued that his Fourteenth Amendment right was violated and he should be granted a new trial consistent with due process of law. Taken together, these three references were enough to alert the state court to the nature and basis of Castillo's constitutional claims.

To raise the federal legal theory for purposes of exhaustion, *Lyons v. Crawford*, 232 F.3d at 669-70, all that is required is that a petitioner either reference specific provisions of the federal Constitution or cite to federal case law. *Castillo did both.* Considering that he had also mentioned that he was denied a fair trial in violation of the Constitution in the context of his argument about the videotape, he met his burden.

The Ninth Circuit Court of Appeals seemed to take issue with the fact that Castillo did not invoke the Fourteenth Amendment prior to the concluding sentence of his state appellate brief. However, the Court has never required that a petitioner mention a federal constitutional provision earlier in a brief. Castillo's reference to the

Fourteenth Amendment in his conclusion meets the *Baldwin* description of labeling a claim as "federal." *Baldwin*, 124 S.Ct. 1347, 1351. In *Duncan* and *Lyons*, the Court has held that citation to the United States Constitution is sufficient to exhaust federal claims. *Duncan*, 513 U.S. at 365-366; *Lyons*, 232 F.3d at 668. The Supreme Court merely stated in *Baldwin* that a petitioner must cite the federal source of law on which he relies. 124 S.Ct. at 1351. This citation can be as minimal as simply labeling the claim federal. *Id.* Therefore, since Castillo also recited the facts related to the admission of the videotape and invoked his right to a fair trial under the Fourteenth Amendment he met his burden of exhaustion.

Second, the Arizona Court of Appeals was aware that Castillo was seeking fair trial federal relief in relation to admission of the videotape because Castillo cited federal cases in arguing about the tape. Castillo referenced the federal Constitution and cited to federal cases in the context of his argument that admitting the unredacted videotape of his interrogation violated his right to a fair trial.

The Ninth Circuit Court of Appeals majority relies on *Johnson* and *Hiivala*, 88 F.3d at 830-31; 195 F.3d at 1106 (respectively). In *Johnson*, the petitioner did not specifically reference the United States Constitution or federal case law. 88 F.3d at 830-31. Similarly, in *Hiivala*, the court held that the petitioner failed to exhaust his claims when he argued to the state court that the evidence was insufficient to support a state law conviction, but did not refer to the Due Process Clause of the United States Constitution, cite the Fourteenth Amendment, nor cite any federal cases involving the legal standard for a federal constitutional violation. 195 F.3d at 1106-07. Thus, *Hiivala* and *Johnson*

are clearly distinguishable from this case, where Castillo did all three.

Moreover, in conjunction with citing federal cases, appealing to the federal constitutional principle of a "fair trial," and citing the Fourteenth Amendment, Castillo's Arizona Appeals Court brief also discusses the videotape in light of the Arizona state law concept of "fundamental error." The Arizona Supreme Court has noted that fundamental error "usually, if not always, involves the loss of federal constitutional rights." *State v. Gendron*, 168 Ariz. 153, 812 P.2d 626, 628 (Ariz. 1991). However, the panel holds that Castillo's mere assertion of fundamental error does not mean he asserted a federal constitutional claim because claims subject to fundamental error review may consist entirely of assertions under Arizona law. However, because Castillo raised "fundamental error" under Arizona law in conjunction with citing federal case law, mentioning "fair trial", and citing to the Fourteenth Amendment evidences that the Arizona Court of Appeals was put on notice that he was presenting a federal constitutional claim.

In addition, the Ninth Circuit has long held that "fair presentation" should be liberally construed in favor of the hallowed purpose behind the Great Writ. *Picard v. Connor*, 404 U.S. 270, 275 (1971) (*quoting Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958)). (In order to exhaust state remedies a Petitioner need not cite "book and verse on the federal constitution."). Equally important principles of federalism and finality of convictions have traditionally governed exhaustion and procedural default. However, exhaustion, which formerly aimed to prevent federal courts from intruding upon "States' sovereign power to punish offenders and their *good-faith* attempts to honor

constitutional rights," *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (emphasis added), has recently become "a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights." *See Coleman v. Thompson*, 501 U.S. 748, 759 (1991) (Blackmun, J., *dissenting*); *see also Smith v. Murray*, 477 U.S. 527, 541 (1986) (Stevens, J., *dissenting*) ("I fear that the Court has lost its way in a procedural maze of its own creation. . . ."). Tragically, those who have had a fundamentally unfair trial, and even those who are innocent, easily stumble. *See Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851 (1995); *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853 (1993).

If the panel's decision stands, State courts can simply ignore federal claims that do not "cite book and verse on the constitution," and thereby, avoid federal habeas scrutiny. The Ninth Circuit Court of Appeals' decision encourages state courts to ignore federal claims. Under the Ninth Circuit's decision, if a state court simply ignores the federal claim, the federal court will construe that as "evidence" that the claim was not "fairly presented" and the federal claim will never be entertained at the federal level. The panel's decision encourages this because its rationale relies, in part, upon the Arizona Court of Appeals ignoring Castillo's federal claim.

b. The admission of the videotape was plain error pursuant to the standard set forth in *Dubria*.

The only authoritative case on point regarding the "plain error" issue is *Dubria v. Smith*, 224 F.3d 995 (9th Cir. 2000) (*en banc*). In that case, a woman was killed by chloroform intoxication. *Id.* at 999. The defendant had been exclusively in the company of the victim for days

preceding her death, but he could not explain how the victim was exposed to chloroform. *Id.* at 1001. The trial judge allowed into evidence a videotape interview of the defendant by police detectives in which the detectives expressed disbelief in the defendant's story and elaborated on the police's theory of the crime. *Id.* at 1000.

In *Dubria*, the Ninth Circuit stated that "viewed in its entirety . . . the tape and transcript show what the state appellate courts quite properly described as an '*unremarkable interview*'. . . . There was nothing in [the detective's] statements that suggested evidence or theories of the case that were not presented at trial." *Id.* at 1001. (Emphasis added.) Furthermore, Dubria was the **only** person who was ever with the victim, and the **only** person who could have committed the murder. It was for that reason that the videotape admission in *Dubria* did not amount to a violation of due process.

Castillo's case is fundamentally different. Castillo's interrogation was certainly anything but an unremarkable interview. The medical evidence presented at trial was extensive. Yet no expert set a time frame on the child's death that was narrow enough to preclude that the child's mother had caused his fatal injury. The detective, however, misrepresented in the videotape that the medical analysis did provide such concrete evidence. In the face of confusing medical testimony and a clear (but false) statement by law enforcement, it is likely that the detective's statement had a substantial impact on the jury. In contrast to *Dubria*, precisely because the videotape did suggest evidence not presented at trial, the improper admission in this case quite most likely had a substantial and injurious effect or influence in determining the jury's verdict.

Any curative statement made by the judge was not sufficient to avoid the injurious effect on the verdict. Given the highly inflammatory content of the tape suggesting that the medical evidence was far more conclusive than it actually was, even with a curative instruction, the injurious effect on the jury's verdict could not have been mitigated. *See U.S. v. Gillespie*, 852 F.2d 475, 479 (9th Cir. 1988) (finding under the circumstances that "the trial court's curative instruction to the jury was not sufficient to obviate the prejudice"); *cf. Dubria*, 224 F.3d at 1002 ("This is not a case in which the statements at issue are so clearly prejudicial that a curative instruction could not mitigate their effect.").

CONCLUSION

The majority opinion of the Ninth Circuit Court of Appeals overlooked material facts and law regarding exhaustion through "fairly presenting" a claim to the Arizona Court of Appeals. Castillo's claim was improperly procedurally barred. Furthermore, admission of the videotape constitutes reversible "plain error" in violation of Castillo's right to a fair trial under the Fourteenth Amendment.

For the foregoing reasons, Armando Castillo respectfully requests that this Court reverse his conviction.

RESPECTFULLY SUBMITTED this 23 day of May 2005.

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ARMANDO CASTILLO, Petitioner-Appellant, v. JAMES MCFADDEN; ARIZONA ATTORNEY GENERAL, Respondents-Appellees.

No. 03-15715

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

399 F.3d 993; 2005 U.S. App. LEXIS 3220

February 24, 2005, Filed

JUDGES: Before: Pamela Ann Rymer, Michael Daly Hawkins, and Jay S. Bybee, Circuit Judges.

OPINION:

ORDER AMENDING OPINION AND DISSENT AND DENYING PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

The opinion and dissent filed on June 1, 2004 and published at 370 F.3d 882 (9th Cir. 2004), are hereby amended. The amended opinion and amended dissent are filed concurrently herewith. The Opinion and Dissent are amended as follows:

1. At slip op. 6914, first full paragraph, line 11; 370 F.3d at 886, second full paragraph, line 17, delete "In short, the petitioner must have either referenced specific provisions of the federal constitution . . . or cited to federal case law."

2. At slip op. 6914, first full paragraph, line 15; 370 F.3d at 886, second full paragraph, line 22, insert the following: "Consistent with the recognition that state and federal courts are jointly responsible for interpreting and safeguarding constitutional guarantees, we have held that citation to either a federal or state case involving the legal

standard for a federal constitutional violation is sufficient to establish exhaustion." *See id.; Peterson v. Lampert,* 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc) ("For purposes of exhaustion, a citation to a state case analyzing a federal constitutional issue serves the same purpose as a citation to a federal case analyzing such an issue."). In short, the petitioner must have either referenced specific provisions of the federal constitution or cited to federal or state cases involving the legal standard for a federal constitutional violation."

3. At slip op. 6914, second full paragraph, line 20; 370 F.3d at 887, line 13, insert the following after the phrase "or cite any federal": "or state."

4. At slip op. 6917, first full paragraph, line 5; 370 F.3d at 888, second full paragraph, line 7, insert the following after the word "relevant": "state or federal."

5. At slip op. 6917, first full paragraph, line 17; 370 F.3d at 888, second full paragraph, line 28, insert the following before "Citation": "Similarly, none of the state cases relied on by Castillo to support his third point of error involved the express invocation, explanation or discussion of due process standards. *E.g., State v. Hughes,* 189 Ariz. 62, 938 P.2d 457 (1997) (en banc) (criminal appeal construing the Arizona Rules of Evidence); *State v. Miller,* 186 Ariz. 314, 921 P.2d 1151 (1996) (criminal appeal discussing waiver and fundamental error under the Arizona Rules of Evidence); *State v. McVay,* 127 Ariz. 450, 622 P.2d 9 (1980) (criminal appeal construing the Arizona Rules of Evidence); *State v. Williams,* 111 Ariz. 511, 533 P.2d 1146 (1979) (criminal appeal reviewing admissibility of evidence); *Maxwell v. Aetna Life Ins. Co.,* 143 Ariz. 205, 693 P.2d 348 (App. 1984) (civil appeal applying doctrine of

fundamental error); *Hinson v. Phoenix Pie Co.,* 3 Ariz. App. 523, 416 P.2d 202 (App. 1966) (civil appeal construing the Arizona Rules of Civil Procedure)."

6. At slip op. 6917, first full paragraph, line 18; 370 F.3d at 888, second full paragraph, line 29, insert the following after "irrelevant federal": "or state."

7. At slip op. 6925, second full paragraph and the carryover paragraph on page 6926, 370 F.3d at 893, first full paragraph, replace paragraph with the following: "To raise the federal legal theory for purposes of exhaustion, *Lyons v. Crawford,* 232 F.3d 666, 669-70 (9th Cir. 2000), as modified by 247 F.3d 904 (9th Cir. 2001), a petitioner must simply characterize a claim as federal in nature, by either referencing specific provisions of the Constitution or citing to federal or state case law analyzing the federal constitutional issue. *See Peterson v. Lampert,* 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). Castillo did both, citing specific provisions of the Constitution and federal cases. He went further, referencing his Fourteenth Amendment right to due process in his conclusion.[5] Considering that he had also mentioned that he was denied a fair trial in violation

[5] The majority notes that "citation of a relevant federal constitutional provision in relation to some other claim does not satisfy the exhaustion requirement." But Castillo did not reference violation of his Fourteenth Amendment due process rights in relation to another specific claim, for instance, as a part of either of his other argument sections. Had he done so, of course the state court should not be charged with assuming that the reference applies to the other arguments. Rather, Castillo's brief only required the court to make a slight inferential step to put together his two references – denial of a fair trial in violation of the U.S. Constitution in the context of his videotape argument and violation of the Fourteenth Amendment in the conclusion.

of the Constitution in the context of his argument about the videotape,[6] he met his burden."

8. At slip op. 6926, second full paragraph; 370 F.3d at 893, third full paragraph, replace paragraph with the following: "The majority relies on *Johnson* and *Hiivala*. 88 F.3d 830-31, 195 F.3d at 1106. But, in *Johnson,* the petitioner made no specific reference to the Constitution or federal case law. 88 F.3d at 830-31. Similarly, in *Hiivala,* we held that the petitioner failed to exhaust his claims when he argued to the state court that the evidence was insufficient to support a state law conviction, but made no reference to the Due Process Clause, the Fourteenth Amendment, nor any federal or state cases involving the legal standard for a federal constitutional violation. 195 F.3d at 1106-07. Thus, *Hiivala* and *Johnson* are clearly distinguishable from this case, where Castillo did all three."

9. At slip op. 6926, footnote 8, lines 1-3; 370 F.3d at 893, footnote 8, lines 2-4: delete "Our case law requires citation to federal case law and reference to specific provisions of the federal Constitution" and replace with "Our case law requires citation to federal or state case law analyzing the federal constitutional issue or reference to specific provisions of the federal Constitution."

10. At slip op. 6930, first full paragraph, line 1; 370 F.3d at 895, third full paragraph, line 1: delete "To me, this" and replace with "This."

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[6] I concede that under *Hiivala*, reference to denial of a fair trial, on its own, would not have been sufficient for exhaustion. 195 F.3d 1098, 1106.

With these amendments, Judges Rymer and Bybee have voted to deny the petition for panel rehearing and/or rehearing en banc, and Judge Hawkins has voted to grant the petition for panel rehearing and/or rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

With the filing of the amended opinion and amended dissent, no further petitions for panel rehearing or rehearing en banc may be filed. *See* 9th Cir. G.O. 5.3(a).

ARMANDO CASTILLO, Petitioner-Appellant, v. JAMES MCFADDEN; ARIZONA ATTORNEY GENERAL, Respondents-Appellees.

No. 03-15715

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

370 F.3d 882; 2004 U.S. App. LEXIS 10625

February 12, 2004, Argued and Submitted, San Francisco, California
June 1, 2004, Filed

COUNSEL: Anders V. Rosenquist, Jr., and Florence M. Bruemmer, Rosenquist & Associates, Phoenix, Arizona, for the petitioner-appellant.

John L. Saccoman, Assistant Attorney General, Phoenix, Arizona, for the respondents-appellees.

JUDGES: Before: Pamela Ann Rymer, Michael Daly Hawkins, and Jay S. Bybee, Circuit Judges. Opinion by Judge Bybee; Dissent by Judge Hawkins.

OPINION BY: Jay S. Bybee

OPINION: BYBEE, Circuit Judge:

Petitioner Armando Castillo, an Arizona prisoner, appeals the District Court's dismissal of his amended petition for habeas corpus. 28 U.S.C. § 2254. Castillo's amended petition alleges the Arizona trial court denied Castillo "a fair trial in violation of the Fifth and Fourteenth Amendments" of the U.S. Constitution by permitting the jury to view what he contends was a highly prejudicial videotape of his interrogation. We conclude that Castillo failed to exhaust his state court remedies and affirm the District Court's dismissal of his petition.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Arizona charged Castillo with second-degree murder and child abuse. The charges arose from a June 13, 1998, incident in which Castillo tended his girlfriend's two-year-old son. The child was sick with flu-like symptoms at the time and slept most of the day. While his girlfriend was gone, Castillo allegedly shook the two-year-old child, causing his death. Castillo adamantly insisted that he never harmed the child or shook him in any way. His theory, presented at trial, was that after his girlfriend returned and he left the apartment, she found her child sleeping and covered in vomit and mucus, panicked, and shook him in an attempt to wake him up, thereby causing his injuries.

In May 1999, Castillo was tried by jury in the State Court of Arizona for Maricopa County. The trial judge allowed the jury to view a videotape of the police interrogating Castillo that he argues was highly prejudicial. The videotape showed Castillo invoking his right to counsel and the interrogating detective making, according to Castillo, "numerous false and highly prejudicial misstatements of the evidence." On the videotape, which we have viewed, the detective asserted that the autopsy "scientifically proved" that only Castillo could have killed the two-year old, and repeatedly accused Castillo of lying and causing the child's death. Castillo repeatedly denied the detective's accusations.

Outside the jury's presence and before the videotape was shown, defense counsel argued that the court should exclude the videotape because the detective's statements were inaccurate hearsay. The prosecution argued that it did not offer the detective's statements for their truth, but

to show "interview technique." The trial judge said that he would hold a hearing to view the videotape and directed the attorneys not to mention it until after the hearing. He never held the promised hearing.

At trial, the prosecutor and defense counsel again argued whether the court should permit the videotape into evidence. Castillo objected on the grounds that the detective's statements were irrelevant. The court overruled Castillo's objection and allowed the videotape to be shown.

Prior to showing the videotape, the court orally instructed the jury: "You will be hearing some statements made by Detective Lewis on these tapes and the statements made are made to show their effect on the defendant, they are not made to show that they are necessarily true." After the prosecution showed the videotape and outside of the jury's presence, however, the trial judge frankly confessed his misgivings about the decision to admit the videotape and expressed concern about its potentially prejudicial effect. "In my 19 years on the trial bench, I have never ever admitted a tape like that in evidence. I'm really concerned about it." The court then opined that its decision would "never hold up if there is any appeal, never in a million years." To cure any potential prejudice, the court gave the jury a written instruction that

> the audiotape interview viewed by you during this trial includes statements made to Mr. Castillo by a police officer. The audiotape was provided for you to hear Mr. Castillo's statements and his reaction to the police officer's statements. The information in the questions themselves are not evidence and should not be considered by you as evidence. The police officer's statements to Mr.

> Castillo are only to be considered by you to determine their effect upon the response made by Mr. Castillo.

The court also read a substantially identical version of this instruction to the jury before closing arguments.

Castillo was convicted on both counts of the indictment. He moved for a new trial, but the court denied the motion. Although the trial judge concluded that he should not have admitted portions of the videotape because they were irrelevant and prejudicial, he nonetheless concluded that the error as to these portions of the tape was harmless, and all the other material on the tape was properly admitted. The court sentenced Castillo to twenty-years imprisonment for the second-degree murder conviction and seven-years imprisonment for the child abuse conviction, to run concurrently.

Following sentencing, Castillo appealed to the Arizona Court of Appeals. The Court of Appeals affirmed Castillo's conviction and sentence by a memorandum decision explaining its rationale. Castillo then petitioned for discretionary review in the Arizona Supreme Court. The Arizona Supreme Court denied review without comment. Castillo did not pursue Arizona post-conviction relief.

On March 15, 2002, Castillo filed a petition and an amended petition for habeas corpus in the U.S. District Court for the District of Arizona.[1] Beyond challenging the

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[1] The Antiterrorism and Effective Death Penalty Act applies to Castillo's § 2254 amended petition because he filed his original petition after the Act's date of enactment, April 24, 1996. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 107(c), 110 Stat. 1214, 1226 (1996).

trial court's impanelment of the jury as a violation of the Sixth and Fourteenth Amendments and claiming a violation of the Fourteenth Amendment under *Batson v. Kentucky,* 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), Castillo's amended habeas petition alleges that the Arizona trial court denied Castillo "a fair trial in violation of the Fifth and Fourteenth Amendments" of the U.S. Constitution, by admitting the videotape of his interrogation and arrest. Arizona answered the petition by arguing, *inter alia,* that Castillo had failed to exhaust his federal due process claim in the Arizona state courts and that his claim was now procedurally defaulted.

A magistrate judge issued a report and recommendation that agreed Castillo had not exhausted his claim. He concluded Castillo had not demonstrated cause and prejudice to excuse his default and recommended that the District Court dismiss the petition with prejudice. Alternately, he recommended that the District Court deny the claim on the merits because any error was harmless. Castillo objected, but the District Court adopted the report and recommendation and denied the petition. Nonetheless, the District Court granted Castillo a certificate of appealability with respect to "the introduction of the videotape." Castillo timely appealed.

STANDARD OF REVIEW

We review de novo Castillo's failure to exhaust his Arizona remedies. *Vang v. Nevada,* 329 F.3d 1069, 1072 (9th Cir. 2003).

DISCUSSION

Arizona renews its argument that Castillo's failure to exhaust state remedies bars federal habeas review.[2] "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A); *see also id.* § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.").

To exhaust his Arizona remedies, Castillo had to give the Arizona courts a "fair opportunity" to act on his federal due process claim before presenting it to the federal courts. *O'Sullivan v. Boerckel,* 526 U.S. 838, 844-45, 144 L. Ed. 2d 1, 119 S. Ct. 1728 (1999); *Peterson v. Lampert,* 319 F.3d 1153, 1155-56, 1159 (9th Cir. 2003) (en banc). We consider Castillo's briefing to the Arizona Court of Appeals to determine whether he fairly presented his federal due process claim to the Arizona courts.[3]

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[2] On appeal, Castillo fails to challenge the magistrate judge's conclusion, adopted by the District Court, that he had procedurally defaulted his unexhausted, federal, constitutional claim concerning the admission of the videotape. Thus, Castillo has waived any argument on appeal that he may return to Arizona state court to exhaust his unexhausted claim. Accordingly, we uniquely address Castillo's antecedent failure to exhaust and not the issue of any resulting procedural default.

[3] In cases not carrying a life sentence or the death penalty, "claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them." *Swoopes v. Sublett,* 196 F.3d 1008, 1010 (9th Cir. 1999). We assume without

(Continued on following page)

Castillo's brief to the Arizona Court of Appeals needed to apprise Arizona that he was making a claim under the U.S. Constitution, *see Duncan v. Henry,* 513 U.S. 364, 365-66, 130 L. Ed. 2d 865, 115 S. Ct. 887 (1995), and describe "both the operative facts and the federal legal theory on which his claim is based so that the state courts [could] have a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Kelly v. Small,* 315 F.3d 1063, 1066 (9th Cir. 2003) (citations and internal quotation marks omitted). Castillo must have "characterized the claims he raised in state proceedings *specifically* as federal claims. In short, the petitioner must have either referenced specific provisions of the federal constitution . . . or cited to federal case law." *Lyons v. Crawford,* 232 F.3d 666, 670 (2000) (emphasis in original), *as modified by* 247 F.3d 904 (9th Cir. 2001).

Mere "general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial," do not establish exhaustion. *Hiivala v. Wood,* 195 F.3d 1098, 1106 (9th Cir. 1999) (citation omitted). Nor is it enough to raise a state claim that is analogous or closely similar to a federal claim. For example, in *Johnson v. Zenon,* 88 F.3d 828 (9th Cir. 1996), the petitioner argued in Oregon state court that the admission of prior act evidence "'infringed on his right to present a defense and receive a fair trial,'" and therefore this evidentiary error was not harmless under Oregon law. *Id.* at

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deciding that we look to Castillo's Arizona Court of Appeals brief to determine whether Castillo afforded Arizona a fair opportunity to address his federal due process claim. Whether we also should consider his petition submitted to the Arizona Supreme Court is an open question we need not address, as the brief and the petition repeat the relevant language almost verbatim.

830-31. We held that the petitioner had not exhausted his Oregon remedies with respect to his federal claims: he had argued exclusively Oregon evidentiary law and never apprised the Oregon court that he was asserting a federal claim. *Id.* Similarly, in *Hiivala,* the petitioner failed to exhaust his Washington remedies when he argued to the Washington state court that the evidence was insufficient to support his conviction. 195 F.3d at 1106-07. Hiivala did not relate his claim to the Due Process Clause of the U.S. Constitution, cite the Fourteenth Amendment, or cite any federal cases involving the legal standard for a federal constitutional violation. *Id.*

Moreover, citation of a relevant federal constitutional provision in relation to some other claim does not satisfy the exhaustion requirement. Recently, the Supreme Court, reversing our court, concluded that a petitioner had failed to exhaust his available state remedies when he referenced the Sixth Amendment in relation to his claim that *trial counsel* was ineffective, but failed to reference it again in respect to his separate claim for ineffective assistance of *appellate counsel. See Baldwin v. Reese,* 158 L. Ed. 2d 64, 124 S. Ct. 1347, 1351 (2004).

Here, Castillo claims that his various trial court motions and his opening brief in the Arizona Court of Appeals presented his federal due process claim to the Arizona Court of Appeals. We disagree.

Castillo principally argues that his motion for a new trial, trial supplemental briefing, and trial motion to reconsider fairly presented his federal, constitutional due process claim to the Arizona Court of Appeals. The Supreme Court foreclosed that argument in *Baldwin.* The Arizona appeals court was not required to comb the trial

court's decision to discover Castillo's federal constitutional issue. *Baldwin,* 124 S. Ct. at 1350 (declining to require state appellate judges to read lower state court opinions). *A fortiori,* the Arizona Court of Appeals was not required to review the parties' trial court pleadings to see if it could discover for itself a federal, constitutional issue. To exhaust his claim, Castillo must have presented his federal, constitutional issue before the Arizona Court of Appeals within the four corners of his appellate briefing. *Id.* at 1351. Therefore, we reject Castillo's assertion that his trial court pleadings fairly presented his federal due process claim to the Court of Appeals.

Alternately, Castillo argues that his appellate briefing exhausted his Fourteenth Amendment due process claim concerning the admission of the videotape. At best, counsel's briefing merely hinted at the existence of any federal due process claim. In his brief's statement of the issues, Castillo articulated three separate questions. The headings to his arguments closely mirrored these questions, affirmatively answering each question with only minor variation. Castillo presented the following questions to the Arizona Court of Appeals:

> I. Whether the trial court committed reversible [sic] in dismissing three jurors for cause who expressed concern about the court's requirement that they commit to following the court's instructions on the law without having first heard the instructions?
>
> II. Whether the trial court erred in finding racially neutral cause for the prosecutor's exercise of peremptory challenge to remove the only African-American from the jury?

> *III. Whether the trial court committed fundamental error by allowing the jury to view highly prejudicial videotapes of Appellant's interrogation and arrest and in failing to grant the subsequent motions for a new trial or the motion for reconsideration?*

(emphasis added). The only argument at issue in this appeal is question three. Castillo's statement of that issue and its corresponding argument heading were entirely silent as to any federal due process claim. Castillo neither mentioned in relation to that claim the source of his claimed right, *viz.*, the Fourteenth Amendment Due Process Clause, nor asserted any federal due process violation.

Similarly, the argument section of Castillo's briefing was all but devoid of any language presenting his federal due process argument to the Arizona Court of Appeals. On issue one, Castillo had argued that the trial court violated his Sixth Amendment right to a fair trial by an impartial jury, presumably incorporated against Arizona by the Fourteenth Amendment. On issue two, he claimed a *Batson* violation under the Fourteenth Amendment. In contrast, on issue three, Castillo focused his argument on whether the trial court should have excluded the videotape because it was prejudicial under Arizona Rule of Evidence 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."). Nowhere in the argument concerning the videotape, until the penultimate sentence, did Castillo even refer to the U.S. Constitution. Finally, at the end of his argument, Castillo claimed that "[b]ecause this improper evidence was admitted, Appellant was denied a fair

trial in violation of the United States and the Arizona Constitutions."

That general appeal to a "fair trial" right, however, failed to exhaust Castillo's claim. *Hiivala,* 195 F.3d at 1106. It did not reference, as we require, any specific provision of the U.S. Constitution on which he rested his claim. *Lyons,* 232 F.3d at 670. Neither did Castillo cite relevant cases that might have alerted the Arizona court to his claim. *Baldwin,* 124 S. Ct. at 1351. Two of the three federal cases that he cited, *United States v. Hale,* 422 U.S. 171, 45 L. Ed. 2d 99, 95 S. Ct. 2133 (1975), and *Shepard v. United States,* 290 U.S. 96, 78 L. Ed. 196, 54 S. Ct. 22 (1933), discussed federal evidentiary rules, not due process principles. *See, e.g., Hale,* 422 U.S. at 173 (declining to reach any federal constitutional question); *Shepard,* 290 U.S. at 104 (excluding evidence admitted under the "dying declaration" exception to the hearsay rule of evidence because of the risk of prejudice). The third case that Castillo cited, *Grunewald v. United States,* 353 U.S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957), did not concern the Due Process Clause, but the Fifth Amendment privilege against self-incrimination. *Id.* at 415. Citation of irrelevant federal cases does not provide a state court with a "'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Kelly,* 315 F.3d at 1066.

Sandgathe v. Maass, 314 F.3d 371 (9th Cir. 2002), is not to the contrary. In that case, an Oregon post-conviction trial court expressly decided that Sandgathe was "not denied any right guaranteed . . . under the United States Constitution. . . ." *Id.* at 376-77. The Oregon Court of Appeals affirmed without any opinion. *Id.* at 375. Noting the Supreme Court's presumption that "where there has

been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground," *Ylst v. Nunnemaker,* 501 U.S. 797, 803, 115 L. Ed. 2d 706, 111 S. Ct. 2590 (1991), we concluded that, "in light of the [post-conviction trial court's] prior decision," the Oregon Court of Appeals' summary affirmance also reached the merits of Sandgathe's federal claim. *Id.* at 378 & n.4. Thus, the *Ylst* presumption meant Sandgathe had adequately presented his federal claim to the Oregon Court of Appeals and thereby exhausted it, notwithstanding his otherwise confused appellate briefing and reliance on "inapposite federal citations." *Id.* at 378. *Sandgathe* so held because the "post-conviction trial court explicitly ruled on the federal constitutional issues and there is no indication that the Court of Appeals did not. . . ."[4] *Id.*

Here, Castillo cannot claim the benefit of the *Ylst* presumption. Unlike in *Sandgathe,* the Arizona Court of Appeals addressed each of the issues Castillo briefed and argued and issued its own reasoned state judgment. It

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[4] Although we need not resolve the issue here, we question whether *Sandgathe's* approach to exhaustion of state court remedies has survived the Supreme Court's recent decision in *Baldwin.* As previously noted, *Baldwin* disclaimed our circuit's approach to exhaustion that had effectively required a state appellate court to review a lower court's decision for federal issues. 124 S. Ct. at 1351. *Baldwin* held that the availability of a lower court opinion addressing a federal issue – an issue not otherwise presented within the four corners of a petitioner's state appellate briefing – did not "fairly present" a federal claim to a state court such that the claim would be exhausted. *Id. Sandgathe,* however, looked to the lower court decision and presumed that the Oregon Court of Appeals had affirmed on the same federal grounds. 314 F.3d at 378. It did not limit the exhaustion inquiry to whether Sandgathe had presented his federal claim in the four corners of his state court appellate briefing.

rejected on state law grounds Castillo's argument concerning the admission of his videotaped interrogation; it was silent as to any federal issue. Castillo had to alert the reviewing court to either the particular federal constitutional provisions or relevant federal cases upon which he relied. *Lyons,* 232 F.3d at 670. But he cannot raise Arizona evidentiary claims, cite cases dealing with the admission of evidence, mention the words "fair trial" and then reasonably expect the Arizona Court of Appeals to understand that he is complaining of anything other than evidentiary errors.

The conclusion of Castillo's brief did no better in fairly presenting a federal due process claim to the Arizona Court of Appeals. The brief's parting sentence asserted that "the gross violations of Appellant's Fifth, Sixth, and Fourteenth Amendment rights requires [sic] that his convictions and sentences be reversed and that he be granted a new trial consistent with due process of law." This conclusory, scattershot citation of federal constitutional provisions, divorced from any articulated federal legal theory, was the first time Castillo's brief used the words "due process" or "Fifth Amendment."[5] Castillo, therefore, left the Arizona Court of Appeals to puzzle over how the Fifth, Sixth, and Fourteenth Amendments might relate to his three foregoing claims. Even if counsel-crafted briefing merited our liberal construction, the Arizona

[5] Castillo's citation of the Fifth Amendment was, of course, incorrect. The Fifth Amendment prohibits the federal government from depriving persons of due process, while the Fourteenth Amendment explicitly prohibits deprivations without due process by the several States: "*nor shall any State* deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV (emphasis added).

Court of Appeals would have had to infer that because the Sixth and Fourteenth Amendments likely related to Castillo's impartial jury claim and because the Fourteenth Amendment Equal Protection Clause likely related to his *Batson* claim, by implication, the Fifth Amendment (or, more accurately, the Fourteenth Amendment) would have had to relate to his denial of a fair trial as a result of the admission of the videotape. Such a process of elimination with a dose of charitable construction amounts to a good deal more than "a slight inferential step." Dissent at 6925 n.5. After all, Castillo's general reference to the Fourteenth Amendment in his conclusion might have referred to either his impartial jury or his *Batson* claims. Referring to the Fourteenth Amendment in relation to these other claims does not exhaust his separate assertion that the trial court violated his federal due process rights by admitting the videotape. *Baldwin,* 124 S. Ct. at 1351. Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory.

Nor could Castillo exhaust his federal due process argument by asserting that the trial court committed "fundamental error" by admitting the videotaped interrogation. "Fundamental error," a matter of Arizona law, is "an appellate mechanism for considering and ruling on issues which were not presented to the trial court," *Villafuerte v. Lewis,* 75 F.3d 1330, 1335 (9th Cir. 1996), analogous to "plain error" review in federal court. The Arizona doctrine preserves for appeal issues that "may be so important that overriding considerations concerning the integrity of the system will excuse a party's failure to raise the issue in the trial court." *State v. Gendron,* 168 Ariz. 153, 812 P.2d 626, 628 (Ariz. 1991). Although the Arizona

Supreme Court has noted that fundamental error "usually, if not always, involves the loss of federal constitutional rights," *id.*, Castillo's mere assertion of fundamental error does not mean he asserted a federal constitutional claim; claims subject to fundamental error review may consist entirely of assertions under Arizona law. *See Johnson v. Lewis,* 929 F.2d 460, 462 (9th Cir. 1991) (holding that when neither the petitioner's state court briefs nor the state court's decision made any reference to any federal constitutional claim or cited any federal constitutional cases, the lack of fundamental error found by the state court was a lack of fundamental error under Arizona's state constitution). Thus, an argument of "fundamental error" under Arizona law does not equate to raising a federal constitutional argument.

Moreover, Castillo could not have expected an Arizona "fundamental error" claim to alert the Court of Appeals to the particular federal claim he now advances. Appellate counsel assert "fundamental error" when trial counsel failed to object properly at trial. *Villafuerte,* 75 F.3d at 1335. Here, Castillo repeatedly objected to the videotape's admission in the trial court on federal constitutional grounds. Accordingly, he preserved his right to appeal that issue; he had no need to argue that the videotape's admission was "fundamental error." If anything, the claim of "fundamental error" would have directed the Court of Appeals to consider an issue not raised or otherwise preserved below.

CONCLUSION

Castillo did not fairly present his federal due process claim to the Arizona Court of Appeals. Thus, he failed to

exhaust that claim. We may not correct counsel's failure to make this argument at the proper place and time by allowing him to argue now what should have been argued in hindsight. Accordingly, we do not reach the merits of Castillo's federal due process claim and affirm the District Court's dismissal of his petition.

AFFIRMED.

DISSENT BY: Michael Daly Hawkins

DISSENT: HAWKINS, Circuit Judge, dissenting:

A two-year old child tragically dies. The mother and her boyfriend, Armando Castillo ("Castillo"), are separately alone with the child when the fatal injuries occur. The medical evidence, sparse as it is, could be used to support a case against either. Law enforcement, convinced Castillo is responsible, conduct an in-custody interrogation of him which is captured on videotape. The lead detective, attempting to extract a confession,[1] repeatedly accuses Castillo of the crime and tells Castillo that he knows he is lying because the medical evidence is entirely inconsistent with Castillo's version of events. The tape also shows Castillo being patted down and asking for a lawyer. Throughout, the detective's pointed questions are laced with accusations that are simply not true:

> The bottom line is, is that he had a brain injury .... That could have only happened while he was with you.... The injury has been narrowed down [to occurring] during the time that you had him.... [The injury] was so acute that it had to

[1] Castillo does not confess, rather he repeatedly reasserts his innocence.

> happen within maybe a two hour period. . . . And you were the only one that was with him. . . . And that injury is consistent with either being shaken very hard or thrown down . . . or something to that effect that would of caused . . . his brain to bleed. . . . That's all scientifically proved at this point.

When the prosecution proposes the use of the entire videotape as evidence, Castillo's counsel objects. In the mistaken belief that he has reviewed the tape in advance, an experienced and thoughtful trial judge allows the tape, false accusations and all, to be played to the jury. When he realizes his mistake, the judge is obviously embarrassed and chagrined:

> In my 19 years on the trial bench, I have never ever admitted a tape like that in evidence. I'm really concerned about it. I actually thought at first that counsel has agreed ahead of time, had exchanged transcripts, . . . that there really wasn't a big objection to admission of these tapes. . . . I was, therefore, shocked when I started to hear this tape and read some of the things on this, the transcripts. The man invoking his rights was shown to the jury, his arrest, his pat down. I mean I would never have admitted any of this. . . . I've never admitted a tape like this before. Never. Never. . . . I can't get over it. This will never hold up if there is any appeal, never in a million years.

The prosecutor relies on the tape's content in final argument and the jury convicts Castillo. In denying a motion for new trial, the trial judge again admits a serious mistake in admitting the videotape, but nonetheless denies relief on the reasoning that any error from its

admission was harmless. The state appellate courts agree and affirm Castillo's 20-year sentence for child abuse and second degree murder on the basis that no fundamental error occurred at the trial.

My colleagues say we cannot reach the merits because counsel did not properly preserve the issue on appeal, failing to exhaust the federal due process claim in the Arizona state courts.[2] I cannot agree. The use of the videotape has been a central issue in this appeal from the beginning, and Castillo did reference the violation of his constitutional due process rights in his briefs to the state courts. However labeled, Castillo consistently complained of the use of the videotape in evidence and the correspondingly obvious prejudicial impact. And make no mistake about it, the tape is powerful evidence; so potent that all the curative instructions in the world could not erase its impact. I would, therefore, reach the merits and grant the petition.

I. Procedural Default

My colleagues determine that Castillo did not exhaust his state court remedies. Citing the Supreme Court's recent decision in *Baldwin v. Reese*, 158 L. Ed. 2d 64, 124

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[2] Technically, there is a difference between "failure to exhaust" and "procedural default." If a "defendant merely fails to exhaust, he may still be able to return to state court to present his claims there." *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th Cir. 2002). Procedural default connotes that the petitioner would not be able to return to state court. *Id.* Here, it is clear that Castillo would not be able to return to state court, his state court claims being procedurally barred. Therefore, "procedural default" is the correct term, even though it is at times used interchangeably with "failure to exhaust" in the majority opinion and in this dissent.

S. Ct. 1347, 1350 (2004), they note that a state appeals court is not required to read the trial court decision to discover a constitutional issue *not pled in the briefs*. But where we disagree is precisely over Castillo's pleadings to the Arizona Court of Appeals, and *Baldwin* did not change those rules.

To preserve his federal constitutional claim, Castillo was required to specifically apprise the state court that he was making such a claim. *See Duncan v. Henry,* 513 U.S. 364, 365-66, 130 L. Ed. 2d 865, 115 S. Ct. 887 (1995); 28 U.S.C. § 2254(b)(1)(A). He was required to describe to the state court the operative facts concerning his claim and the federal legal theory on which his claim is based – that the admission of the videotape violated his due process right to a fair trial under the Fourteenth Amendment. *See Kelly v. Small,* 315 F.3d 1063, 1066 (9th Cir. 2003), *cert. denied,* 538 U.S. 1042, 155 L. Ed. 2d 1077, 123 S. Ct. 2094 (2003). Castillo had to give the state courts a "fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." *Id.* (internal quotation marks omitted). A general appeal to the broad principle of due process would not have been sufficient for exhaustion purposes, nor would it have been sufficient to only raise a state law claim that was similar to a federal claim. *Hiivala v. Wood,* 195 F.3d 1098, 1106 (9th Cir. 1999); *see Duncan,* 513 U.S. at 366; *Johnson v. Zenon,* 88 F.3d 828, 829-31 (9th Cir. 1996). But we have more than a general appeal, here, and more than just a state law claim. Although the federal constitutional claim was not well developed, I would hold that it was certainly sufficient to alert the state of Arizona to Castillo's theory and to adequately raise the issue for exhaustion purposes.

There is no argument that Castillo did describe the facts surrounding the admission of the videotape in his brief to the state appellate court, even if he did so mostly in the context of his state law claims. The question is whether he sufficiently raised the federal constitutional argument.

In Castillo's state appellate court briefs,[3] he argued that he was denied a fair trial in violation of the United States Constitution. Also in that section, he cited three federal cases.[4] And in his conclusion, he argued that his Fourteenth Amendment right was violated and that he should be granted a new trial consistent with due process of law. Taken together, these three references should have been enough to alert the state court as to the nature and basis of Castillo's constitutional claims.

To raise the federal legal theory for purposes of exhaustion, *Lyons v. Crawford,* 232 F.3d 666, 669-70 (9th Cir. 2000), as modified by 247 F.3d 904 (9th Cir. 2001), requires that a petitioner either reference specific provisions of the federal Constitution or cite to federal case law. Castillo did both. Although it was in his conclusion,[5] he

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[3] We may examine both Castillo's briefs to the Arizona Court of Appeals and the Arizona Supreme Court because, with the exception of life-sentence or capital cases, "claims of Arizona state prisoners are exhausted for purposes of federal habeas once the Arizona Court of Appeals has ruled on them." *Swoopes v. Sublett,* 196 F.3d 1008, 1010 (9th Cir. 1999).

[4] None of the cases specifically applied to the federal due process claim.

[5] The majority notes that "citation of a relevant federal constitutional provision in relation to some other claim does not satisfy the exhaustion requirement." But Castillo did not reference violation of his Fourteenth Amendment due process rights in relation to another specific claim, for instance, as a part of either of his other argument

(Continued on following page)

referenced his Fourteenth Amendment right to due process. Considering that he had also mentioned that he was denied a fair trial in violation of the Constitution in the context of his argument about the videotape,[6] he met his burden.

Second, this is even clearer because Castillo cited federal cases. In the context of determining whether the petitioner fairly exhausted his state court remedies, this court in *Sandgathe v. Maass*, 314 F.3d 371, 378 (9th Cir. 2002), noted that a petitioner's citation of federal constitutional cases "were not at all on point[.]" Still, the court said that "confused arguments or poor lawyering through inapposite federal citations is not the same as failing to raise an argument at all." *Id.*[7] Castillo referenced the federal Constitution and cited to federal cases in the context of his argument that admitting the unredacted videotape of his interrogation violated his right to a fair

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sections. Had he done so, of course the state court should not be charged with assuming that the reference applies to the other arguments. Rather, Castillo's brief only required the court to make a slight inferential step to put together his two references – denial of a fair trial in violation of the U.S. Constitution in the context of his videotape argument and violation of the Fourteenth Amendment in the conclusion.

[6] I concede that under *Hiivala*, reference to denial of a fair trial, on its own, would not have been sufficient for exhaustion. 195 F.3d at 1106.

[7] In *Sandgathe*, the panel ultimately held that the petitioner exhausted his claims because the state appellate court had addressed the federal issues, despite any arguable weaknesses in petitioner's presentation of the federal issues in his briefs to that court. 314 F.3d at 376-378.

trial. We cannot ask for perfection – this should be enough.[8]

The majority relies on *Johnson* and *Hiivala*. 88 F.3d at 830-31, 195 F.3d at 1106. In *Johnson,* the petitioner did not specifically reference the United States Constitution or federal case law. 88 F.3d at 830-31. Similarly, in *Hiivala,* this court held that the petitioner failed to exhaust his claims when he argued to the state court that the evidence was insufficient to support a state law conviction, but did not refer to the Due Process Clause of the United States Constitution, cite the Fourteenth Amendment, nor cite any federal cases involving the legal standard for a federal constitutional violation. 195 F.3d at 1106-07. Thus, *Hiivala* and *Johnson* are clearly distinguishable from this case, where Castillo did all three.

II. Habeas Standard

Because I conclude that Castillo did sufficiently raise the federal due process claim in the Arizona state courts, I turn to the application of the Antiterrorism and Effective Death Penalty Act ("AEDPA") standard, where the Arizona state courts did not rule upon Castillo's federal claim. Typically, when presented with an AEDPA-governed

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[8] The majority says that Castillo engaged in "drive-by citation." Our case law requires citation to federal case law and reference to specific provisions of the federal Constitution. Our case law does not require that the petitioner devote a paragraph or a page or an entire argument section to the federal legal issue. There simply must be a reference to federal law sufficient to put the state court on notice of the claim so that the court can address the issue. The state court, in what should have been careful review of the briefs, certainly had enough to address the federal claim.

habeas petition on appeal, we would review the state court opinion de novo to determine whether that opinion was "contrary to or involved an unreasonable application of clearly established federal law." 28 U.S.C. § 2254(d); *Lewis v. Lewis,* 321 F.3d 824, 829 (9th Cir. 2003). Yet the reasoning of the Arizona courts was based entirely on state law – the state courts did not apply federal law at all.

To comply with federal precedent, however, a state court need not be aware of the precedent, let alone cite it. *Early v. Packer,* 537 U.S. 3, 8, 154 L. Ed. 2d 263, 123 S. Ct. 362 (2002). Instead, federal courts are to examine whether the standard actually applied, in this case state harmless error analysis, is contrary to clearly established Supreme Court precedent. *Id.* at 11. This court has applied *Early* in two situations – where the state court administers a reasoned opinion, even if it does not address federal law, and where the state court does not issue a reasoned opinion. *See Powell v. Galaza,* 328 F.3d 558, 562-63 (9th Cir. 2003); *Greene v. Lambert,* 288 F.3d 1081, 1089 (9th Cir. 2002). Clearly the former is applicable here. Although the state appellate court did not discuss federal precedent, it did issue a reasoned opinion on the state law question of fundamental error.[9] Thus, under *Powell,* we must independently examine the record and determine whether the *result* of the case, regardless of the state law reasoning, is contrary to federal precedent. 328 F.3d at 562-63.

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[9] Although fundamental error is an Arizona state law concept, the Arizona Supreme Court has noted that fundamental error "usually, if not always, involves the loss of federal constitutional rights." *State v. Gendron,* 168 Ariz. 153, 812 P.2d 626, 628 (1991). Still, the mere assertion of fundamental error is not equivalent to an assertion of a federal constitutional claim.

III. Merits

On habeas review under AEDPA, the question is whether the state court's decision that admission of the videotape was harmless error was "contrary to" clearly established law. 28 U.S.C. § 2254(d).[10] The writ must be granted if the state court's decision "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an opposite] result. . . ." *Williams v. Taylor,* 529 U.S. 362, 405, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). In this case, the question is whether the state court decision based on harmless error was contrary to Supreme Court precedent.

Under *Brecht v. Abrahamson,* 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), a violation of due process under the United States Constitution occurs when there was an error in admitting the evidence and that error had a substantial effect on the jury's verdict.

First, it seems clear that the videotape was admitted in error, or at the very least, parts of it were. The trial judge conceded as much and Arizona does not argue to the contrary, claiming instead that any error in admitting the

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[10] The statute also allows the federal reviewing court to ask whether the state court decision was an "unreasonable application of" Supreme Court precedent. 28 U.S.C. § 2254(d). This test is not applicable to Castillo's case, however, because a state court decision only involves an unreasonable application if the state court actually identified the correct governing legal principle, but then misapplied it. *See Williams v. Taylor,* 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Here, the state court did not identify any federal principle at all.

videotape was harmless. Under the Arizona Rules of Evidence, the interview was irrelevant. ARIZ. R. EVID. 401-402; *see also* ARIZ. R. EVID. 403 (even if the interview was determined to be relevant, it likely should have been excluded under Rule 403, which provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."). At least parts of the interview were also hearsay not subject to any hearsay exceptions.[11] *See* ARIZ. R. EVID. 801-802.

Second, even if a Federal Rule of Evidence was violated, *Brecht* holds that to establish a due process violation, the petitioner must show that the improper admission of evidence had "a substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 637 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)).[12] The Supreme Court applied the *Brecht* standard in *O'Neal v. McAninch,* 513 U.S. 432, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995). In that case, the Court held that where "the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error[,]" the court must hold that the error substantially influenced the jury's decision. *Id.* at 437. The Court specifically adopted this rule and not the opposite rule, which would deny the writ in cases of grave uncertainty, because the latter rule

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[11] The government asserts that the interview was admitted in evidence to show "interview technique."

[12] *O'Neal* makes clear that despite the burden of proof seemingly being put on the petitioner, the proper question is – "Do I, the judge, think that the error substantially influenced the jury's decision?" *O'Neal,* 513 U.S. at 436.

"would tell judges who believe individuals are *quite possibly* being held 'in custody in violation of the Constitution' that they cannot grant relief." *Id.* at 442. Such a rule would be "contrary to the writ's most basic traditions and purposes." *Id.*[13]

To me, this case presents just that situation. There were no witnesses to this crime, no medical evidence to dispute Castillo's defense that the child's mother shook the baby in her panic, and no evidence that the child's other, non-fatal injuries, were caused by Castillo, other than that Castillo often watched the child.[14] This was a case that turned entirely on credibility, and Castillo's credibility was clearly tarnished by his portrayal as a criminal in the improperly admitted videotape. Although the magistrate judge refers to "overwhelming evidence of [Castillo's] guilt," even without the videotape, it is unclear what that overwhelming evidence is.

Arizona argues that this circuit's opinion in *Dubria v. Smith*, 224 F.3d 995 (9th Cir. 2000) (en banc), is instructive. In that case, a woman was killed by chloroform intoxication. *Id.* at 999. The defendant had been in the company of the victim almost nonstop for days preceding her death. *Id.* He could not explain how the victim was exposed to chloroform. *Id.* at 1001. The trial judge allowed into evidence a videotape interview of the defendant by police detectives in which the detectives expressed disbelief

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[13] Although this decision came before the passage of AEDPA, AEDPA does not change these basic policy considerations.

[14] Castillo's testimony suggested that the child's biological father may have harmed the child when the child visited the father and also that some of the injuries may have been caused by rough play between the child and Castillo's older children.

in the defendant's story and elaborated on their theory of the crime. *Id.* at 1000.

Although *Dubria* was a pre-AEDPA case, it is instructive, albeit for different reasons than Arizona argues. There, we said that "viewed in its entirety . . . the tape and transcript show what the state appellate courts quite properly described as an "unremarkable interview". . . . There was nothing in [the detective's] statements that suggested evidence or theories of the case that were not presented at trial."[15] *Id.* at 1001. It was for that reason that the videotape admission in *Dubria* did not amount to a violation of due process.

This case is different. This was certainly anything but an unremarkable interview. The medical evidence presented at trial was extensive. Yet no expert set a timeframe on the child's death that was narrow enough to preclude Castillo's theory that the child's mother had caused his fatal injury. The detective, however, clearly represented in the videotape that the medical analysis did provide such concrete evidence. In the face of confusing

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[15] The California Court of Appeal had stated:

> There is no doubt the officers were accusatory and suggested in a variety of ways they did not believe appellant. The jury would certainly understand this to be the police position and would give to it no more weight than they would the fact appellant was charged by the prosecutor with murder or that the prosecutor clearly also disbelieved appellant. . . . The officers' comments, however, suggested no more than what the People proposed to prove at trial. There was nothing particularly damning in the officers' statements or suggestions of evidence or theories that the People did not present or offer at trial.

Dubria, 224 F.3d at 1001 n. 2.

medical testimony and a clear statement by law enforcement, it is quite likely that the clear statement had a substantial impact on the jury. In contrast to *Dubria,* precisely because the videotape *did* suggest evidence not presented at trial, the improper admission in this case quite probably had a substantial and injurious effect or influence in determining the jury's verdict.

In further contrast to *Dubria,* any curative statement made by the judge was not sufficient to avoid the injurious effect on the verdict. Given the highly inflammatory content of the tape suggesting that the medical evidence was far more conclusive than it actually was, even with a curative instruction, the injurious effect on the jury's verdict could not have been mitigated. *See United States v. Gillespie,* 852 F.2d 475, 479 (9th Cir. 1988) (finding under the circumstances that "the trial court's curative instruction to the jury was not sufficient to obviate the prejudice"); *cf. Dubria,* 224 F.3d at 1002 ("This is not a case in which the statements at issue are so clearly prejudicial that a curative instruction could not mitigate their effect.").

Castillo has a viable claim that admission of the videotape violated his right to due process under the Fourteenth Amendment.[16] The state court's harmless error analysis was contrary to clear Supreme Court precedent in *O'Neal v. McAninch,* 513 U.S. 432, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995). Specifically, the state court's analysis "contradicts the governing law" set forth in *Brecht* and applied in *O'Neal,* that in the face of important trial

[16] No state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AM. 14.

errors, including constitutional violations, a judge facing grave doubt about whether an error affected a jury must determine that the error had a "substantial and injurious effect" on the jury's verdict. 513 U.S. at 438.

IV. Conclusion

I would grant the writ and remand for a new trial. The evidence that was admitted was so prejudicial that despite the limiting instructions, the evidence still had a substantial and injurious effect or influence in determining the jury's verdict, particularly considering there was scant other evidence presented of Castillo's alleged guilt. Under AEDPA, the state court decision was therefore contrary to clearly established federal precedent. Therefore, I respectfully DISSENT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Armando Castillo, Petitioner, vs. James McFadden; Arizona Attorney General, Respondents,	) No. CIV 02-0466-PHX-PGR (DKD)))) **REPORT AND RECOMMENDATION**))) (Filed Feb. 25, 2003)

TO THE HONORABLE PAUL G. ROSENBLATT, U.S. DISTRICT JUDGE:

Armando Castillo filed a petition for writ of habeas corpus on March 15, 2002 (Doc. #1), challenging his convictions for child abuse and second degree murder. The trial court sentenced him to an aggravated seven year term for the child abuse, to be served consecutively to the twenty year presumptive term for the murder. He contends (1) the trial court violated his due process rights by failing *sua sponte* to preclude the admission of certain prejudicial parts of his videotaped interviews with the police; (2) the trial court violated his Sixth Amendment right to a fair and impartial jury by removing three prospective jurors who could not follow the court's instructions; and (3) the trial court violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by allowing the prosecutor to use a preemptory strike on a prospective juror who was African-American. For the reasons stated below, the Court recommends that Castillo's petition be denied and dismissed without prejudice.

EXHAUSTION OF STATE REMEDIES

A state prisoner must exhaust his state remedies before petitioning for a writ of habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *McQueary v. Blodgett*, 924 F.2d 829,833 (9th Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 839-846 (1999). In Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by properly pursuing them through the state's direct appeal process or through appropriate post-conviction relief. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). A claim has been fairly presented if the petitioner has described both the operative facts and the federal legal theory on which the claim is based. *Blan v. Cal. Dep't of Corrections*, 20 F.3d 1469, 1472-73 (9th Cir.1994), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir.2000) (en banc); *Tamalini v. Stewart*, 249 F.3d 895, 898-99 (9th Cir.2001). The exhaustion requirement will not be met where the Petitioner fails to fairly present his claims. *Roettgen*, 33 F.3d at 38.

If a petition contains claims that were never fairly presented in state court, the federal court must determine whether state remedies remain available to the petitioner. *See Rose v. Lundy*, 455 U.S. 509, 519-20 (1982); *Harris v. Reed*, 489 U.S. 255, 268-270 (1989) (O'Connor, J., concurring). If remedies are available in state court, then the federal court may dismiss the petition without prejudice pending the exhaustion of state remedies. *Id.* However, if the court finds that the petitioner would have no state

remedy were he to return to the state court, then his claims are considered procedurally defaulted. *Teague v. Lane*, 489 U.S. 288, 298-99 (1989); *White v. Lewis*, 874 F.2d 599, 602-605 (9th Cir. 1989). The federal court may decline to consider these claims unless the petitioner can demonstrate that a miscarriage of justice would result, or establish cause for his noncompliance and actual prejudice. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 86 (1977); *United States v. Frady*, 456 U.S. 152, 167-68 (1982).

A procedural default may occur when a Petitioner raises a claim in state court, but the state court finds the claim to be defaulted on procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). In such cases, federal habeas review is precluded if the state court opinion contains a plain statement clearly and expressly relying on a procedural ground "that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *See Harris*, 489 U.S. at 260. A state procedural default ruling is "independent" unless application of the bar depends on an antecedent ruling on the merits of the federal claim. *See Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985); *Stewart v. Smith*, ___ U.S. ___, 122 S.Ct. 2578, 2581 (2002). A state's application of the bar is "adequate" if it is "strictly or regularly followed." *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (quoting *Hawthorn v. Lovorn*, 457 U.S. 255, 262-63 (1982)). In cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, just as in cases involving defaulted claims that were not fairly presented, federal habeas review of

the claims is barred unless the prisoner can demonstrate a miscarriage of justice or cause and actual prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51. When a state procedural default prevents the state courts from reaching the merits of federal claims, the adequate-and-independent-state-ground doctrine prohibits federal habeas courts from addressing these claims. *Wainwright v. Sykes*, 433 U.S. 72, 81-86 (1977); *Vansickel v. White*, 166 F.3d 953, 957 (9th Cir. 1999).

DISCUSSION

Castillo first contends the trial court should have excluded certain portions of the videotaped interviews with police. The trial court denied Castillo's motion for new trial on this issue:

> After further consideration the Court now Finds, Determines and Orders as follows:
>
> 1. The State was in error in letting the jury see a video tape of Defendant being told to empty his pockets by Detective Lewis and being advised that he had been arrested, which occurred at the inception of the second interrogation of Defendant on July 1, 1998 (Two video tapes of the Defendant's discussion with Detective Lewis were recorded, the first on June 14, 1998, and the second, when he was arrested on July 1, 1998. Ms. Brnovich has advised that on the tape of July 1, 1998, at 10:57.55 – 10:58.36, the Defendant is told to empty his pockets and the fact of his arrest is stated by Detective Lewis and this was shown to the jury.) The State was in error in not redacting this prejudicial portion and also the portion at the very end of the interrogation of July 1, 1998 where Defendant asks Detective

Lewis "Can I have a lawyer appointed for me" and "Can I see a lawyer" to which the answer by Detective Lewis was "Yes". The State should have on its own redacted all this material from the tape or brought it to the attention of the Court prior to showing it to the jury to get a ruling from the Court as to whether those portions of the tape should be shown to the jury.

2. The defense was in error in not bringing the above specific instances to the Court's attention and arguing specifically that such matters should be excised. The defense further erred in not requesting the trial judge to view the two video tapes with specific written objections presented to the Court prior to such viewing. The objection "relevancy" perhaps should have but did not alert this Court to this specific prejudicial material (ie. the material set forth in paragraph 1 above) being shown to the jury. The court thought there was only an objection being made to the use of any part of such tapes on the basis of relevancy and the alleged prejudical comments made by Detective Lewis to the Defendant during the interrogations. The Court rejected this argument under the rationale of *State v. Miller*, 186 Ariz. 314, 921 P.2d 1151 (1996), *cert. denied*, 117 S.Ct. 1088.

3. This Court was in error in not fully comprehending there was indeed a dispute in connection with the two video tapes. The court believed the two sides had agreed to certain redactions of the two video tapes and, except for the Miller-type prejudice objection (i.e. the questions of Detective Lewis were inadmissible hearsay and prejudicial) that the relevancy objection was being made pro forma. The Court was thus in error in not sua sponte requiring a viewing of

the two and a half hours (total time of tapes) with the lawyers present and outside the presence of the jury. This is the normal practice of this court when there are specific objections made to video or audio tapes or transcripts of same. Without such a viewing the trial judge could not fully appreciate the significance of the objection made by the defense on the basis of "relevancy" as well as the other objection concerning alleged distortions used by Detective Lewis during the interrogation. (Defense counsel never requested the court to view the two *interrogation* tapes out of the presence of the jury to this court's knowledge, although this Court advised at the beginning of the trial that it would do so in connection with the tape recordings of telephonic *confrontation* calls made by the mother of the child to the Defendant.)

4. the Court finds that the disclosure made by the State on July 30, 1998 in State's Notice of Discovery that it would offer in evidence and rely on "Evidence stemming from . . . tape recorded interviews" gave the defense sufficient notice that the State would attempt to offer in evidence the video tapes recorded June 14, 1998 and July 1, 1998. Moreover, defense counsel admits that the State gave him notice about a week prior to the trial that the video tapes would be introduced after redaction and that the State requested the Defendant to offer his redaction at that time. Defense counsel advises he did not request any redactions because he felt that neither tape was admissible in whole or in part because of redundancy, cumulative testimony and most importantly relevancy. There is thus no issue that the video tapes were not properly disclosed by the

> State to be offered in evidence in advance of the trial.
>
> 5. It is the view of the Court that the above-referred-to errors of Court and counsel with respect to the two video tapes, while permitting improper and prejudicial material to be shown to the jury, (i.e. the material set forth in paragraph 1, above), under all the circumstances of this case constitute harmless error, whether that testimony is considered separately or taken as a whole. It is the Court's view that the jury would have found Defendant guilty beyond a reasonable doubt without the improper admission of such evidence. It is the Court's view that such material did not so prejudice the case against Defendant that he could not receive a fair trial. The Court remains of the view that the other material on both tapes (i.e. material not mentioned in paragraph 1 above) was properly admitted.

(Doc. #10, Exh. B, Minute Entry, 9/01/99).

Castillo argued in his direct appeal that the admission of the videotape constituted *fundamental error, depriving him of a fair trial*. However, he did not raise it as a federal constitutional claim. A claim of fundamental error, and deprivation of a fair trial is not a reference to a federal legal theory necessary for a fair presentation. *Tamalini v. Stewart*. In addition, Castillo has not demonstrated the required cause and prejudice to excuse the default. *Coleman v. Thompson*.

A federal court may deny a habeas claim on the merits, despite the failure to exhaust. *See* 28 U.S.C. § 2254(b)(2). The appellate court agreed with the trial court that the error was harmless and did not deprive

Castillo of a fair trial. It affirmed the trial court's ruling that the jury would have found Castillo guilty beyond a reasonable doubt without the admission of that portion of the videotape, based upon the following evidence:

> Defendant's former live-in girlfriend, C.Y., the victim's mother, testified against defendant. She testified that defendant babysat the [two-year-old] victim, Steven, on June 13, 1998, and that he had been Steven's babysitter for several months prior to the victim's death. Before C.Y. and Steven began living with defendant, C.Y. never noticed any injuries to Steven. After Steven began babysitting, C.Y. noticed bruises on Steven's stomach and testicles, and bumps on Steven's head. According to C.Y., defendant was physically abusive with her. In the early morning hours of June 13, 1998, C.Y. left Steven with defendant while she went to work. She came home in the afternoon to check on Steven, and Steven was walking and talking and appeared to be fine. C.Y. left again to pick up fast food for defendant and Steven. She dropped the food off without entering the apartment. Defendant yelled at C.Y. in the parking lot for forgetting his cigarettes, calling her a "fucking slut" and "bitch." C.Y. returned to work and came home about an hour later. Steven was lying on the couch with a blanket over his head. He was unconscious. C.Y. called 911 and Steven was taken to the hospital.
>
> Dr. Stanley D. Johnsen, a specialist in child neurology, testified that Steven presented with injuries to his abdomen and scrotum, a severe head injury, and an injury to his spine. Dr. Johnsen was "quite convinced" that Steven had suffered an injury of a violent nature. Dr. Johnsen testified that Steven's head injury occurred on

> the afternoon of his admission to the hospital. After suffering the head injury, Steven would have been unable to talk, walk or eat. Steven's injuries were consistent with a child who had a severe blow to the head.
>
> The evidence showed that Steven's injuries occurred while he was in defendant's care; there was no evidence that anyone other than defendant cold have injured Steven.

(Doc. #10, Exh. D at p.7-9).

Assuming Castillo had fairly presented this as a constitutional claim, the error, if any, was harmless. Based upon the overwhelming evidence of his guilt, the admission of the videotape could not have had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abramson*, 507 U.S. 619, 637-38 (1993).

Castillo next contends that his Sixth Amendment right to a fair and impartial jury was violated when the trial court removed three jurors because they could not agree to follow the court's instructions. He made the same argument in his direct appeal. Three prospective jurors were asked if they could accept the written instructions as "gospel in the case." All three initially answered that they could not, and when asked to clarify, again stated they could not (Doc. #10, Exh. A, R.T. 5/10/99 at p. 175). In chambers, after extensive questioning by the judge and both counsel, the judge excused one prospective juror (*Id.*, p. 233), and struck the two other for cause (*Id.*, pp. 228, 235-238). The prospective jurors could not commit themselves to following certain instructions if the law was one that in good conscience they disagreed with or could not uphold (*Id.*).

The court of appeals reviewed the evidence and ruled:

> Potential juror Geoghegan responded that she "probably" would not accept the instructions as gospel, that she was uncertain, and that she thought that she "could not . . . in good conscience put aside [her] own judgment of right and wrong if [she] seriously disagreed with one of those tenants." Potential juror Minkoff stated that if he "strongly disagree[d]" with the law, he could "set that aside and abide by the instructions as given," but that "in an extreme case, if [he found] the law morally outrageous, [he] would not be able to [abide by the instructions]." Potential juror Moon agreed with potential juror Minkoff. The state moved to dismiss Geoghegan, Minkoff, and Moon for cause. The trial court voir dired these potential jurors again, and dismissed each of the potential jurors for cause.
>
> None of the challenged potential jurors would commit to following the instructions. Accordingly, we cannot say that the trial court abused its discretion in dismissing the jurors for cause.

(Doc. #10, Exh. D at p. 2-3).

The trial court properly excused the prospective jurors who indicated that they could not temporarily set aside their personal beliefs in deference to a rule of law. *See Lockhart v. McCree*, 476 U.S. 162, 176 (1986). In doing so, both the trial court and state court of appeals reasonably applied clearly established Federal law. *Id.*; 28 U.S.C. § 2254(d)(1).

Castillo finally contends that the trial court violated *Batson v. Kentucky* in allowing the prosecutor to peremptorily strike an African-American from the jury. The trial court found no purposeful racial discrimination, that there were race neutral reasons shown by the state for the peremptory strike, and that the trial court had race neutral concerns of its own, including the fact that the prospective juror appeared confused about what he was supposed to be doing as a juror (Doc. #10, Exh. A, R.T. 5/10/99 at pp. 242-44).

Applying *Batson* to the facts, the state court of appeals ruled as follows:

> After the prosecutor exercised a peremptory challenge to remove Mr. Mosely, defendant moved to disallow the peremptory challenge. Without determining whether a prima facie showing of discrimination had been made, the trial court elicited the following explanation from the prosecutor for peremptorily challenging Mr. Mosely:
>
> > [B]asically there were two areas that I have written on my notes that concern me about Mr. Mosely. One, it was apparent that he couldn't read. He couldn't read the chart. . . . He didn't look at the chart at all when he was answering the questions. The other area that concerned me was . . . whether or not [he] could take the law at face value. Although he didn't say that he wouldn't take the law at face value, he did make some comments in that regard and it appeared at one point in time he had somewhat of a confusion or problem when . . . a question was posed

> . . . regarding the law and he made the comment well, what if he didn't do it. . . . That was my concern.
>
> The trial court accepted the prosecutor's racially neutral explanation in support of the peremptory challenge.
>
> This court will not disturb the trial court's finding that the prosecutor's exercise of a peremptory challenge was race-neutral unless it is clearly erroneous. *State v. Cruz*, 175 Ariz. 395, 398, 857 P.2d 1249, 1252 (1993) (citation omitted). Because the state's explanation for the peremptory challenge was race-neutral, it satisfied the second *Batson* prong and the trial court did not err in rejecting defendant's challenge to the peremptory strike.

(Doc. #10, Exh. D at pp. 4-5).

The Court finds that both the trial court and court of appeals reasonably applied the *Batson* analysis in finding no purposeful discrimination. *See* 28 U.S.C. § 2254(d)(1).

IT IS THEREFORE RECOMMENDED that Petitioner Armando Castillo's petition for writ of habeas corpus be **DENIED** and **DISMISSED WITH PREJUDICE**.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1);

Rules 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within which to file a response to the objections. Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 24th day of February, 2003.

/s/ David K. Duncan
David K. Duncan
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Armando Castillo, Petitioner, v. Terry L. Stewart, et al., Respondent(s).	)	CV 02-0466-PHX-PGR (DKD) **ORDER** (Filed Mar. 21, 2002)

Petitioner Armando Castillo, presently confined in the Arizona State Prison Complex in Buckeye, Arizona, has filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. An Amended Petition has been filed by Counsel (Doc. #2). Petitioner challenges his judgment of conviction entered in the Maricopa County Superior Court in matter #CR98-09620. The $5.00 filing fee has been paid.

Petitioner presents three (3) grounds in support of his request for relief. Petitioner alleges that he has satisfied the requirement of exhaustion of state remedies by presentment of each issue to the state's highest court.[1] A review of the Petition indicates that an answer is required. 28 U.S.C. § 2254(a).

IT IS THEREFORE ORDERED:

(1) That a copy of the Petition (Doc. #1), Amended Petition (Doc. #3), Exhibits (Doc. #4) and this Order be served by the Clerk of Court upon the Respondent and the

[1] In Arizona, a petitioner who is not challenging a life sentence or capital sentence has exhausted his claims by fairly presenting them to the Arizona Court of Appeals. *See Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1996 (2000).

Attorney General of the State of Arizona by certified mail pursuant to Rule 4, Rules Governing Section 2254 Cases;

(2) That Respondent answer the Petition within 40 days of the date of service. Respondent shall not file a dispositive motion in place of an answer without first showing cause as to why an answer is inadequate. If the Petition was filed after the expiration of the 1-year period of limitation as defined in 28 U.S.C. § 2244(d), the answer may be limited solely to that issue and, if limited to that issue, only those portions of the record relevant to the limitations issue shall be attached to the answer. If the timeliness of the Petition is not in question, the answer shall fully comply with all of the requirements of Rule 5 of the Rules Governing Section 2254 Cases;

(3) That Petitioner shall serve upon Respondent, or if appearance has been entered by counsel, upon the attorney, a copy of every further pleading or other document submitted for consideration by the Court. Petitioner shall include with the original document and copy, to be filed with the Clerk of Court, a certificate stating the date a true and correct copy of the pleading or document was mailed to Respondent or the counsel. Any paper received by a District Judge or Magistrate Judge which has not been filed with the Clerk of Court may be disregarded by the Court;

(4) That at all times during the pendency of this action, Petitioner shall immediately advise the Court and the United States Marshal of any change of address and its effective date. Such notice shall be captioned "NOTICE OF CHANGE OF ADDRESS." The notice shall contain only information pertaining to the change of address and its effective date. The notice shall not include any motions

for any other relief. Failure to file a NOTICE OF CHANGE OF ADDRESS may result in the dismissal of the action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b);

(5) That aside from the two copies of the petition or amended petition that must be submitted pursuant to Local Rule 3.2(a), a clear, legible copy of every pleading or other document filed shall accompany each original pleading or other document filed with the Clerk for use by the District Judge or Magistrate Judge to whom the case is assigned. *See* Rule 1.9(f), Rules of Practice of the U.S. District Court for the District of Arizona. Failure to comply with this requirement may result in the pleading or document being stricken without further notice to Petitioner; and

(6) That this matter is referred to Magistrate Judge David K. Duncan pursuant to Local Rules 1.16 and 1.17 for further proceedings and a report and recommendation.

DATED this 20th day of Mar., 2002.

/s/ Paul G. Rosenblatt
Paul G. Rosenblatt
United States District Judge